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No. 87-

In the Supreme Court

OF THE

United States

October Term, 1987

Atlantic Richfield Company,
Petitioner,

vs.

John V. Nielsen,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether this $3,500,000 punitive damage award, which the state courts affirmed only by failing to apply their own standards for determining the excessiveness of such awards, violates the Excessive Fines Clause of the Eighth Amendment or otherwise violates the Due Process Clause of the Fourteenth Amendment, because it is vastly out of proportion to the petitioner's culpability, the plaintiff's injury, and other punishments for similar conduct.

2. Whether this Court should either reverse the $3,500,000 punitive damage award or remand the award for a state court determination of its constitutional excessiveness where any holding by this Court that the Excessive Fines Clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment applies to punitive damage awards in civil cases will announce a new constitutional right that petitioner could not have previously waived.[1]

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[1]All parties to this case are named in the caption. Pursuant to Rule 28.1 of the Rules of the Court, petitioner submits as Appendix F, *infra*, a list of all non-wholly owned subsidiaries and affiliates of petitioner. That list is submitted as an appendix because of its bulk.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

Atlantic Richfield Company ("ARCO") respectfully petitions this Court to issue a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, to review the constitutional questions raised by that court's affirmance of a $3,500,000 punitive damage award against petitioner. The identical questions, relating to the excessiveness of punitive damage awards, are presently before the Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 ("*Bankers Life*"), which was argued on November 30, 1987, and *The Ohio Casualty Insurance Company v. Downey Savings and Loan Association*, No. 87-159 ("*Downey Savings*"), in which a petition for certiorari was filed on July 22, 1987. Petitioner asks only that it receive the benefit of any new constitutional rights announced in the *Bankers Life* or *Downey Savings* cases to protect parties, such as petitioner, from constitu-

tionally excessive punitive damage awards in civil cases. Petitioner, therefore, respectfully requests that the Court grant the Petition and either reverse or remand this case to the California Court of Appeal for a determination whether the punitive damage award here is excessive under any standards that the Court articulates in *Bankers Life* or *Downey Savings*.

OPINIONS BELOW

The July 6, 1987 opinion of the California Court of Appeal, Fourth Appellate District, is unreported and is reproduced as Appendix A, *infra*. The order denying petitioner's Petition for Rehearing, filed by that court on July 31, 1987, is unreported and is reproduced as Appendix B, *infra*. The October 14, 1987 order of the Supreme Court of California denying petitioner's Petition for Review is unreported and is reproduced as Appendix C, *infra*. The Remittitur of the Court of Appeal certifying that its opinion had become final, issued on October 21, 1987, is unreported and is reproduced as Appendix D, *infra*. The Judgment of the Superior Court of California for the County of San Diego, dated September 24, 1985, is unreported and is reproduced as Appendix E, *infra*.

JURISDICTION

The Court of Appeal rendered its decision affirming (in all respects relevant here) the trial court's judgment against petitioner on July 6, 1987. That decision became final after the Court of Appeal denied petitioner's timely Petition for Rehearing on July 31, 1987 and the Supreme Court of California denied petitioner's Petition for Review on October 14, 1987. The Court of Appeal, in affirming the $3,500,000 punitive damage award, decided points of state law that, assuming this Court announces

applicable new constitutional principles in *Bankers Life* or *Downey Savings*, give rise to the constitutional questions presented herein. For the reasons reviewed at pp. 9-13, *infra*, these constitutional questions are properly and timely presented herein. This Petition is being filed within ninety days of the denial of review by the Supreme Court of California. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment provides, in pertinent part:

"[N]or [shall] excessive fines [be] imposed * * *."

2. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

"[N]or shall any State deprive any person of * * * property, without due process of law * * *."

STATEMENT OF THE CASE

The $3,500,000 punitive damage award in this case is surpassed in reported California appellate opinions only by the $5,000,000 award affirmed in *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987). This case and *Downey Savings* share many characteristics besides the enormity of their punitive damage awards: Both involve claims of business fraud, and in both cases punitive damages were awarded greatly in excess of the actual injuries suffered by the plaintiffs. In both cases, the California Courts of Appeal refused to reduce the punitive damage awards, finding them not excessive as a matter of state law, and

the California Supreme Court refused even to review the awards.[2]

Now both cases have been brought to this Court. The defendant in *Downey Savings* filed its petition for a writ of certiorari on July 22, 1987. (*The Ohio Casualty Insurance Company v. Downey Savings and Loan Association*, No. 87-159.) This Court has taken no action, but presumably is holding the petition pending its disposition of *Bankers Life*. Because this case involves the same constitutional issues presented by *Downey Savings* (although *Downey Savings* involves issues not presented here, *see* Petition for Writ of Certiorari in No. 87-159, Question Presented No. 2) and, as demonstrated by the facts reviewed at pp. 4-8 *infra*, the punitive damage award in this case is just as excessive as the award in that case, principles of fairness and equal treatment under the law suggest that the Court also should hold this petition until after its opinion in *Bankers Life*. It then should either reverse or remand this case for a state court review of the punitive damage award in light of the constitutional standards announced in that opinion.

A. Statement of Facts

Plaintiff John V. Nielsen sued ARCO claiming that it had fraudulently induced him to amend his lease to convert his conventional service station into a mini-market offering groceries and self-service gasoline. The alleged fraud involved ARCO's projection of future

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[2]In *Downey Savings*, the Court of Appeal also made clear that California courts would not apply federal law to reduce such awards, because the Eighth Amendment "applies only to criminal actions, not to purely civil penalties * * *." 189 Cal. App. 3d at 1101; 234 Cal. Rptr. at 851.

gasoline and food sales, and resulting profit, at the converted mini-market.

ARCO had made the challenged projection for its own internal use. However, Mr. Nielsen was given the projection at a September 1978 presentation on the mini-market program that ARCO made for a number of dealers in San Diego. At that time he discussed the projection with ARCO representatives for "five minutes." The projection estimated profits of $3,599 monthly, based on projected annual food sales of $240,000 and gasoline sales of 1,400,000 gallons. Mr. Nielsen discussed the projection with his accountant, who told him that it was overly optimistic. He also showed the projection to a friend who already operated an ARCO mini-market and who stated that his sales were much higher than the projections for Mr. Nielsen's mini-market. In October 1978, Mr. Nielsen informed ARCO that he wanted to convert his station.

In about January 1979, ARCO management relied on the same sales and profit projections that had been given to Mr. Nielsen to authorize its expenditure of approximately $140,000 to convert the station. On February 16, 1979, ARCO applied for a conditional use permit for the mini-market. The conditional use permit was granted on April 17, 1979, but it limited operation of the mini-market to 17 hours a day. Mr. Nielsen, who knew that a 24-hour operation was important to the success of a mini-market, discussed with ARCO representatives the impact that the hours limitation would have on his profitability, but he decided that he still wanted to proceed with the conversion.

On April 19, 1979, Mr. Nielsen formally committed to the conversion program by executing an Addendum to Lease that amended his pre-existing service station lease with ARCO. At the time that he signed the Addendum to

Lease, Mr. Nielsen also knew that as a result of the oil shortage occasioned by the Iranian oil embargo he would be able to purchase only 95% of the gasoline he had purchased in 1977 and 1978 — an amount far below the 1,400,000 gallons he knew had been projected for his site. Because allocations limited the gasoline a dealer could sell, in May 1979, Mr. Nielsen was advised that he would not be getting the extended pump islands he had been promised for the time being. ARCO gave Mr. Nielsen the opportunity to pull out of the conversion but he declined to do so.

Construction of the mini-market cost ARCO approximately $141,310. Mr. Nielsen invested approximately $26,000 in start-up costs for the unit. Mr. Nielsen's mini-market opened for business on August 4, 1979.

Mr. Nielsen's mini-market soon became a subject of concern to ARCO because it was not meeting its projected sales levels. ARCO suggested to Mr. Nielsen that his sales would improve if he could get the hours restriction lifted by circulating petitions, and by lowering the price of his gasoline. However, Mr. Nielsen did not believe these measures would help and he rejected them.

By November 1980, Mr. Nielsen listed his market for sale for $57,900. Soon thereafter Mr. Nielsen entered into an agreement for sale of the mini-market for $52,900. However, ARCO did not approve the sale because of the buyer's extremely poor performance in ARCO's training school.

Mr. Nielsen did not try to find another buyer. On March 18, 1981, Mr. Nielsen told ARCO that he wanted to leave the mini-market as quickly as possible. Although Mr. Nielsen's agreement with ARCO called for a 90-day notice of termination, ARCO agreed to take the mini-

market back from Mr. Nielsen on April 1, 1981. At the time, Mr. Nielsen had been in default on several months' rent, but ARCO had not taken any steps to terminate his franchise or collect the amount owing.

Mr. Nielsen then brought this lawsuit, claiming that the profit projection was fraudulently inflated. Specifically, Mr. Nielsen attacked as fraudulent the projection of annual food sales of $240,000. The food sales projection was made by an employee in ARCO's marketing research group for ARCO's internal use in deciding whether Mr. Nielsen's site could support a profitable mini-market. This ARCO employee had first projected food sales for Mr. Nielsen's site in May 1978 of $160,000, using demographic figures taken from the 1970 census report. That projection was sent to the ARCO employee in charge of the mini-market program in the San Diego area, who relayed it to field representatives for comment. After receiving word from the field that the projection was too low in light of the substantial growth in the area since 1970, the projection was rerun using information subsequently received about the growth in the area since 1970. The revised food sales projection in August 1978 was $240,000.

Mr. Nielsen did not dispute that there was substantial growth in the area since 1970, but claimed that these two ARCO employees fabricated the revised demographic information so that the projection would satisfy *ARCO's* internal $200,000 minimum requirement for conversion. It is significant to note that Mr. Nielsen did not claim that anyone else at ARCO, including the ARCO employees who gave him the projection, knew that the projection was inaccurate, or that ARCO made these calculations in order to convince Mr. Nielsen to convert his service station. In essence, Mr. Nielsen claimed that these two

employees inflated the projection in order to deceive ARCO, and that he was an indirect victim of that deceit when other ARCO employees, unaware of any problems with the projection, gave it to and discussed it with Mr. Nielsen.

The jury agreed, finding ARCO liable for fraud. The trial court refused to grant ARCO a new trial, although it recognized that the finding of fraud "could have gone the other way."

The jury awarded Mr. Nielsen a total of $525,788 in compensatory damages, comprised of (i) $79,061 "out-of-pocket" damages, which included Mr. Nielsen's $26,000 start-up cost and the value of and lost revenue from the conventional station he gave up, (ii) $50,000 emotional distress damages and (iii) $396,727 in lost anticipated profits Mr. Nielsen allegedly would have made had the market earned the projected profits. Most importantly here, the jury awarded Mr. Nielsen $3,500,000 in punitive damages.

On appeal, ARCO argued that reversal was required because the jury's verdict was not supported by substantial evidence and was the result of clearly inadmissible and highly prejudicial hearsay testimony. ARCO also argued that the compensatory and punitive damages were improper and grossly excessive. The Court of Appeal, while finding that admission of the challenged testimony was error, affirmed the jury's verdict and reduced the damage award by only the $50,000 awarded for emotional distress. The Court of Appeal denied ARCO's petition for rehearing, but modified its Opinion. The Supreme Court of California denied ARCO's Petition for Review.

B. Presentation of the Federal Questions

Petitioner consistently argued that the $3,500,000 punitive damage award was excessive from the time the jury's verdict was announced. It argued both to the trial court on a motion for a new trial (Clerk's Transcript ("C.T.") at 665) and to the state appellate courts that the award bore no reasonable relationship to the seriousness of the alleged wrongful conduct,[3] the actual damages suffered by the plaintiff[4] or the punitive damage awards in other similar cases.[5] Those arguments admittedly were framed only in state-law terms. Thus, state law conferred upon those courts the power, and the obligation, to modify any punitive damage award which " ' "as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." ' " *Neal v. Farmers Insurance Exchange*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978). While framed under state law, petitioner's arguments nonetheless should have caused the courts to examine some or all of the factors that this Court likely will hold are relevant to the inquiry under either the Eighth Amendment or the Due Process Clause, should it hold those provisions applicable to punitive damage awards in civil cases. *See* p. 16 *infra*. Those courts, however, found

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[3]*E.g.*, Appellant's Opening Brief, filed November 3, 1986 ("AOB"), at 44 ("ARCO's conduct was not reprehensible when compared to the conduct in other cases involving large punitive damage awards").

[4]*E.g.*, AOB 47 ("[E]ven the traditional comparison shows an unreasonable relationship in that punitive damages exceed compensatory damages by almost $3 million").

[5]*E.g.*, AOB 44 (noting that the punitive damage award in *Hartman v. Shell Oil Co.*, 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977) — which Mr. Nielsen repeatedly described to the trial court as a "closely analogous" case (*e.g.*, C.T. 692) — was only $15,000).

the $3,500,000 award not excessive, only by failing to consider any factors other than the defendant's wealth. App. A, at 40a- 41a ; App. B, at 44a.

Petitioner did not specifically assert an Eighth Amendment (or Due Process) right to be free of excessive civil punitive damages, because then-existing law did not recognize any such right.[6] Such a right will exist only if this Court announces it in *Bankers Life* or *Downey Savings*. The California Court of Appeal in *Downey Savings* stated the existing law that the Eighth Amendment "applies only to criminal actions, not to purely civil penalties * * *." 189 Cal. App. 3d at 1101; 234 Cal. Rptr. at 851. More significantly, this Court's opinion in *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (cited in *Downey Savings*), described the Eighth Amendment as "limit[ing] the power of those entrusted with the *criminal-law* function of government," and "protect[ing] those convicted of *crimes*," and adhered to this "longstanding limitation" by holding the Eighth Amendment inapplicable to the paddling of children in public schools. (Emphasis added.) As described at p.16 *infra*, the appellant in *Bankers Life* has made a forceful and persuasive argument based principally upon legal history that the Eighth Amendment protects litigants from the infliction of excessive monetary punishments even in a civil case. However, even the Brief of Appellant in that case was unable to cite a single opinion holding the Eighth Amendment applicable to civil punitive damages.

In these circumstances, petitioner's failure to cite the Eighth Amendment to either the trial court or the Court

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[6]Moreover, there arguably was no violation of petitioner's constitutional rights, assuming that this Court will hold that such rights exist, until the state appellate courts refused to reduce the excessive punitive damage award.

of Appeal cannot constitute a waiver of its right to rely upon that Amendment should this Court now announce that the Amendment applies. A majority of this Court has indicated that a litigant can never be viewed as having waived a constitutional right prior to the Court's recognition of that right. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (plurality opinion of Harlan, J.); at 172 n.1 (Brennan, J. concurring, joined by White, J.):

> "* * * [T]he mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time * * *, but an effective waiver must, as was said in *Johnson v. Zerbst* * * * be one of a 'known right or privilege.'" (388 U.S. at 143 (citations omitted).)

Moreover, petitioner called the California courts' attention to the Constitutional issue when it appeared possible that this Court could announce a new right. Recognizing that this Court could have announced such a right before the California Supreme Court had completed review of this case, petitioner raised the Eighth Amendment argument in its Petition for Review to that court, as follows:

> "* * * The United States Supreme Court has signified its intention to decide whether punitive damage awards are subject to the Eighth Amendment's prohibition against 'excessive fines' by noting probable jurisdiction in *Bankers Life and Casualty Co. v. Crenshaw*, 55 U.S.L.W. 3607, No. 85-1765 (U.S. Mar. 9, 1987). If the Supreme Court were to establish that the Eighth Amendment so applies, ARCO would also argue to this Court that the jury's $3,500,000 punitive damage award and the Court of Appeal's refusal

> to consider other factors besides ARCO's wealth in reviewing that award violate the Constitutional prohibitions against imposition of 'excessive fines.' " (*Id.* at 13 n.6.)

Mr. Nielsen's Answer to Petition for Review responded that petitioner had already waived those issues, citing a California opinion holding that "[a] claimed violation of a constitutional right must be raised in the trial court to preserve the issue for appeal." (Answer to Petition, at 4 n.3, *citing Selleck v. Globe International, Inc.*, 166 Cal. App. 3d 1123, 1133 n.5, 212 Cal. Rptr. 838 (1985).) Mr. Nielsen undoubtedly again will cite California case law to argue that petitioner waived its federal constitutional rights by not presenting them to the trial court. However, *Curtis Publishing Co.* answers that argument, because petitioner — just like the defendant in that case — could not have waived a "known right or privilege" at trial or, for that matter, at any later time until this Court announces a decision that could support the right.

Finally, petitioner respectfully notes that the Court need not decide issues not first decided below. It can remand these issues to the California Court of Appeal for consideration of petitioner's federal constitutional rights, should this Court announce that such rights exist. The federal questions then will be fully presented at the only time the state courts could meaningfully decide them. This Court previously recognized that a similar "customary procedure" of vacating a judgment of a state court so that the state court could reconsider the case in light of changed law was applicable where a constitutional question had not been raised in the state courts because this Court had not yet announced a decision necessary to make the constitutional argument. *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154, 161

(1945). While the Court did not follow the procedure in that case, it stated that it "would not hesitate to adopt that procedure in the interests of justice if it appeared that otherwise appellant would be foreclosed from adjudication of the issue." *Id.* at 161; *see also id.* at 163 (Jackson, J. concurring). The Court should follow that procedure here, if petitioner otherwise would be foreclosed from adjudication of the Eighth Amendment issue presented by the enormous punitive damage award against it in this case.

REASONS FOR GRANTING THE WRIT

The questions presented here regarding the applicability of the Eighth Amendment and Due Process Clauses to punitive damage awards in civil cases are substantial and recurring and therefore deserving of this Court's decision. Petitioner fully expects such a decision in either *Bankers Life* or *Downey Savings* and respectfully requests that the Court grant it the benefit of any new constitutional limitation on punitive damages announced in those cases.

The facts are somewhat different and the punitive damage awards range from a low of $1,600,000 in *Bankers Life* to a high of $5,000,000 in *Downey Savings* (with the $3,500,000 award in this case in the middle). However, each of these three cases is symptomatic of the *carte blanche* currently given to, and regularly exercised by, juries to subject large (and therefore usually unpopular) defendants to enormous punitive damage awards without regard to the seriousness of their conduct or the actual

damages suffered by the plaintiff.[7] The root cause of the growth in these awards is the abdication by state appellate courts of their obligation to reduce excessive punitive damage awards.

The state court appellate review in this case illustrates the problem. Notwithstanding that the California Supreme Court has identified three considerations "affording guidance" for the review of punitive damage awards: (1) the "reprehensibility" of the defendant's conduct; (2) the relationship of punitive to actual damages; and (3) the defendant's wealth (*Neal v. Farmers Insurance Exchange*, 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389 (1978)), the Court of Appeal's original opinion made clear that it affirmed the award in this case based entirely upon the third factor — ARCO's wealth, as measured by its assets and annual income. (App. A, at 40a-41a.) When ARCO's Petition for Rehearing called the Court of Appeal's attention to the failure to consider the other controlling factors, the court simply stated (but did not analyze or purport to apply) those factors. It also added a sentence making it clear — through its use of the word "though" — that it continued to rely exclusively on ARCO's wealth:

> "The purpose and 'function of deterrence[, though,] will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort.' "

(App. B, at 44a.) This single-minded focus on defendant's wealth will deprive any large defendant of the protection of the first two factors, and subject it to enormous punitive damages unrelated to the nature of the conduct

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[7] The Brief of Appellant in *Bankers Life* sets forth statistics reflecting the substantial growth of punitive damage awards in recent years. *Id.* at 15.

or resulting injury. The California Supreme Court, as it had done just months before in *Downey Savings*, refused even to review this clear failure to apply its multi-factor test.

Each of these state court decisions encourages the award of virtually unlimited punitive damage awards against large companies whatever the nature of the conduct or injury involved. The prospect of these enormous punitive damage awards, in turn, poses a serious risk of over-deterrence, chills a large company's right to defend close cases in good faith, encourages frivolous litigation and affronts elementary principles of fairness and equity.

This Court should send a clear signal that the state courts must stop these gargantuan awards. A ruling that the Eighth Amendment or the Due Process Clause limits the excessiveness of punitive damage awards is only a first step. The Court also must articulate straight-forward standards for determining whether such awards are constitutionally excessive. Finally, it must emphasize to the state courts the importance of applying these standards by reversing and remanding all pending cases in which such an award has been affirmed under state law. For these reasons, the Court should grant this petition and reverse or remand the punitive damage award in this case.

Moreover, there is another, equally important reason for the Court to grant this petition to permit ARCO to assert any new constitutional rights created by this Court. It would be extremely unfair for the Court to announce a new constitutional right — not previously found in any opinion — but to deny its benefits to a litigant who had not waived any " 'known right or privilege.' " *See* pp. 10-12, *supra*; *Curtis Publishing Co. v. Butts*, *supra*.

A. The Court Should Announce that the Eighth Amendment Applies to Punitive Damage Awards in Civil Cases

As the Court of Appeal opinion explicitly recognizes, "[t]he purpose of exemplary damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (App. A, at 41a.) The $3,500,000 award here was designed solely to punish petitioner and not to compensate plaintiff for any actual loss. The award, thus, is entirely penal in nature.

Appellant Bankers Life and Casualty Company has demonstrated in its briefs in this Court that the concept of proportionality and moderation for governmentally-imposed punishments was carried forth in the Eighth Amendment from Chapter 20 of Magna Carta and that, as a result, the Eighth Amendment provides substantial protection from the infliction of excessive monetary punishment in civil cases. *Bankers Life and Casualty Co. v. Crenshaw, supra*, Br. of Appellant, at 16-31. The authorities cited in Appellant's Brief in that case suggest that any Eighth Amendment standards articulated by this Court likely will involve the relationships between the award, on the one hand, and (i) the gravity of the conduct, (ii) the injury to plaintiff and (iii) the size of penalties for similar wrongful conduct, on the other hand. *Id.* at 31-39. *See also United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (Eighth Amendment requires court to look "at the harm suffered by the victim and the defendant's culpability;" forfeiture of $3,000,000 for RICO violation where total amount of fraudulent conduct was $300,000 may be constitutionally excessive).

B. The Punitive Damage Award in this Case Is Excessive

The award in this case is excessive under any standards that this Court necessarily must announce if it reverses the punitive damage award in either *Bankers Life* or *Downey Savings*. Thus, this case involves an award of $3,500,000 — more than twice the award in *Bankers Life*. While the absolute amount of the award is less than that in *Downey Savings*, it is not less than any other punitive damages award that has ever been affirmed in a reported California opinion.

More importantly, unlike either of those two cases and every other case in which a large punitive damage award has been affirmed in California, petitioner's conduct did not involve either a policy or practice of invidious conduct or a special relationship such as that between an insurer and its insureds. *See, e.g., Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 1098, 234 Cal. Rptr. 835 (1987) ($5,000,000 punitive damage award justified because "the jury in [that] case could have reasonably intended to punish [the defendant insurance company] not only for its reprehensible conduct towards [the plaintiff] but also for its invidious practices"); *Moore v. American United Life Insurance Co.*, 150 Cal. App. 3d 610, 640, 197 Cal. Rptr. 878 (1984) ($2,500,000 punitive damage award justified because "defendant consciously pursued a practice or policy of cheating insureds"). The Court of Appeal's Opinion did not even purport to justify the enormous punitive damages in this case by pointing to such a policy, nor could it have done so because there is no admissible evidence that ARCO had a policy or practice of defrauding its dealers. The singular conduct directed toward plaintiff, even assuming it involved fraud, is comparable to that subject to fines of $500 in California

or $1,000 in Mississippi when engaged in by insurers, which unquestionably owe far greater public obligations to their insureds than involved in this case.[8]

The punitive damage award in this case certainly is excessive when compared to other such awards in California. Thus, ARCO was penalized the same $3,500,000 as Ford Motor Company was penalized for engaging in conduct that "endangered the lives of thousands." *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348 (1981). Conversely, Shell Oil Company was penalized only $15,000 for making fraudulent representations to induce the plaintiff to become a Shell dealer, in a case which both Mr. Nielsen and the Court of Appeal have described as "closely analogous" to this case. (C.T. 692; App. A at 28a.) There simply is no way to explain why the punitive damage award in this case was equal to that in the completely inapposite *Grimshaw* case and was 233 times greater than that in the analogous *Hartman* case.

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[8]Appellant's Brief in *Bankers Life* focused on the Mississippi criminal fines applicable to the business of insurance as the appropriate limitation on punitive damages. *Id.* at 33. Similarly, the Petition for Writ of Certiorari in *Downey Savings* (at 15) cited the $500 California fine for failing in good faith to settle insurance claims. *See* Cal. Ins. Code §§ 790.03(h)(5), 790.07 (Deering 1976). The precise conduct at issue here — fraudulently inducing a gasoline dealer to convert his service station to a mini-market — is not covered by any comparable California monetary penalty. The most analogous criminal penalty is the $2,500 fine provided for making false statements with the intent to dispose of property. Cal. Bus. & Prof. Code § 17500 (West 1987). The Mississippi statutes cited in Appellant's Opening Brief in *Bankers Life* impose $1,000 fines for the analogous conduct of making a misrepresentation for the purpose of inducing an insured to surrender his insurance, Miss. Code Ann. § 83-5-35(a) (1972), or making any "untrue, deceptive, or misleading" statement "with respect to the business of insurance," § 83-5-35(b) (1972).

It is similarly impossible to reconcile the relationship between punitive damages and actual damages in this case with similar relationships in other opinions. The relationship between $3,500,000 punitive and Mr. Nielsen's $79,061 actual out-of-pocket damages is 44:1 and the absolute difference is $3,420,939. The California appellate courts have found similar such relationships so grossly disproportionate as to prove conclusively the jury's passion and prejudice. *See, e.g., Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 748-54, 757, 168 Cal. Rptr. 237 (1980), *appeal dismissed*, 450 U.S. 1051 (1981) (ratio and difference reduced from 63:1 and $9,842,000 to 15:1 and $2,342,000); *Little v. Stuyvesant Life Insurance Co.*, 67 Cal. App. 3d 451, 469-70, 136 Cal. Rptr. 653 (1977) (ratio and difference reduced from 14:1 and $2,327,765 to 1.44:1 and $76,765). Even when compared to the total amount of compensatory damages — $475,788, which includes the windfall in lost anticipated profits Mr. Nielsen was awarded — the absolute difference exceeds $3,000,000. That difference is greater than in every published California opinion except *Downey Savings.* Yet, the Court of Appeal affirmed with little discussion, and the California Supreme Court refused even to accept review.

C. Petitioner Also Should Receive the Benefit of Any Rulings Announcing New Due Process Rights Relating to Punitive Damage Awards

Punitive damages are a governmentally sponsored system for imposing penal fines in order to enforce societal standards through punishment and deterrence. As argued in the Petition for Certiorari in *Downey Savings*, proceedings involving the imposition of penalties, including monetary penalties, for such purposes should be subject to the same substantive and procedural protections as are avail-

able to defendants in criminal cases. *Id.* at 24, *citing United States v. Ward*, 448 U.S. 242, 248-51 (1980), and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963). Punitive damages were imposed on ARCO in exactly the same type of trial as in *Downey Savings*. For the reasons reviewed at pp. 9-13 *supra*, ARCO should receive the benefits of any newly announced constitutional right not to have punitive damages imposed in a *civil* trial, where the defendant is not accorded all of the rights he would have in a criminal trial.

Similarly, ARCO should be entitled to the benefits of any newly announced Due Process right to be free from the capriciousness with which punitive damage awards now are imposed. As discussed above, this case, no less than *Bankers Life* and *Downey Savings*, reflects the trend of juries to act with ever increasing arbitrariness in imposing punitive damages and of appellate courts to refuse to apply their own articulated guidelines for judging the excessiveness of such awards. Even if the Court does not hold the Eighth Amendment applicable to punitive damages, it should apply the Due Process Clause to put an end to these arbitrary and capricious awards. *Cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966) (State law that does not impose any "legally fixed standards" to guide judges and juries violates the Due Process Clause).

CONCLUSION

The award of $3,500,000 punitive damages in this case presents the same substantial and recurring questions presented in *Bankers Life* and *Downey Savings*. Petitioner here asks only that it receive the benefit of any rulings in those cases announcing new constitutional rights, which it could not have waived in the state courts because any such rights then were not known. If the Court announces any such new constitutional rights, the Petition should be granted and the punitive damage award either reversed or remanded for a state court determination of its propriety under whatever standards the Court articulates.

January 12, 1988.

Respectfully submitted,

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APPENDIX A

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN V. NIELSEN,
Plaintiff and Respondent,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant and Appellant.

D003945

(Super. Ct. No. 473779)

APPEAL from a judgment and orders of the Superior Court of San Diego County, Douglas R. Woodworth, Judge. Affirmed as modified.

Atlantic Richfield Company (ARCO) appeals a judgment entered on a general jury verdict with special findings awarding John V. Nielsen $525,788 in compensatory damages and $3.5 million in punitive damages on Nielsen's action for fraudulent misrepresentation and concealment in the conversion of his conventional service station to a mini-market and self-service gas facility. ARCO also appeals orders denying its motion for new trial and judgment notwithstanding the verdict (n.o.v.).[1]

[1]"Although an appeal will lie from an order denying judgment n.o.v. (Code Civ. Proc., § 904.1, subd. (d)), the order denying a new trial is nonappealable but subject to review on appeal from the judgment. (See [8] Witkin, Cal. Procedure ([3d ed. 1985]) Attack on Judgment in Trial Court, § [131], p. [534].)" (*Leaf* v. *City of San Mateo* (1984) 150 Cal.App.3d 1184, 1187, fn. 2.)

ARCO contends the verdict is not supported by substantial evidence, the trial court prejudicially erred in admitting hearsay rebuttal testimony, and the compensatory and punitive damages awarded are improper and excessive. We modify and affirm.

I

At the time of the April 19, 1979 agreement to convert his service station to a mini-market and self-service station, Nielsen had been the independent dealer-lessee of the San Carlos ARCO station at Jackson Drive and Golfcrest in San Diego for twelve years. Twenty months later, he walked away from the station in the face of "serious financial difficulty." He filed suit for damages August 14, 1981, alleging causes of action for fraud, negligent misrepresentation, breach of contract, intentional interference with prospective business advantage, breach of third party beneficiary contract, and accounting.

After much discovery and numerous pretrial motions, Nielsen proceeded to trial August 7, 1985, on his fourth amended complaint. At the close of testimony, outside the presence of the jury, the court dismissed with prejudice Nielsen's second cause of action for negligent misrepresentation and limited the fraud and misrepresentation count to actions occurring before the April 19, 1979, formation of the contract for the mini-market. The judge then instructed the jury on four causes of action: (1) fraud and concealment, (2) breach of contract, (3) intentional interference with prospective business advantage, and (4) breach of the covenant of good faith and fair dealing.

The jury returned a verdict September 24, 1985, in favor of Nielsen, specially finding ARCO is liable to

Nielsen for $79,061 out-of-pocket damages, $396,727 other economic damages, and $50,000 in emotional distress damages, all proximately caused by ARCO's fraud and concealment. They further found ARCO knowingly made a false representation concerning a material fact before Nielsen agreed to convert the service station, Nielsen reasonably relied on the representation, ARCO concealed existing material facts, and Nielsen would have acted differently if he knew of the concealed facts. They awarded $3,500,000 in punitive damages. The jury did not find ARCO liable on the other three causes of action.

ARCO moved for judgment n.o.v. and new trial based on, among other grounds, insufficiency of evidence. The trial court denied the motions.

On appeal, ARCO again contends there is no substantial evidence to support the verdict. Specifically, ARCO argues there is no evidence showing either of the two contested elements of ARCO's profit projection was false, that ARCO did not honestly believe the sales projections were true, and that Nielsen's failure to meet sales projections was caused by the alleged false projections.

> "In resolving the issue of the sufficiency of the evidence, we are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]." (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925.)

This same standard applies when we review the trial court's denial of a motion for judgment n.o.v. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 110.) The power of an appellate court begins and ends with the determination whether there is any substantial evidence which will

support the judgment. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The jury is free to believe or disbelieve any witness, and the testimony of one witness, even the party himself, can be sufficient to support a judgment. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) We indulge all inferences and presumptions to support the judgment and resolve any conflicts in favor of the verdict. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

II

Turning to the facts pertinent to the fraud and concealment cause of action, we review the record most favorably to Nielsen.

In 1974, ARCO's gasoline marketing operation suffered $45 million in losses "and there was a real serious question" whether ARCO would "stay in the retail service station business." The mini-market program "was the first major project" for ARCO to get back on track and "make a lot of money for the company." The program converted conventional service stations into units that sold low-cost self-serve gas and high-profit convenience, impulse-type groceries. Existing service bays, offices, and auto supply rooms were gutted to construct mini-markets and install self-serve equipment.

With the conversion, ARCO's gasoline sales increased considerably due to self-serve equipment and low dealer profit margins allowing for lower retail gasoline prices. Dealers paid ARCO a minimum rent for the mini-market, a percentage of all grocery sales above the minimum, and rent for ARCO's gas sold. If, for some reason, a dealer could not make a go of it once the station converted, and another independent dealer was not immediately available to take over, ARCO had its wholly-owned subsidiary,

Prestige Stations, Inc. (PSI) move in and operate the mini-market and station as a dealer.

By late 1977, the success of its first ten mini-markets caused ARCO to launch an all-out campaign to spend $50 million over the next three years for conversion of 400-500 service stations. The conversion program, however, moved slowly, with only 23 stations under construction in February 1978. ARCO sent out a memorandum to all pertinent managers, stating: "If we are to achieve the objective [of] spending . . . $5.5 million [this year], we need more submissions, particularly from the Western Area . . . ." In July 1978, E. G. Reilly, Retail Marketing Vice-President for the United States, wrote to the Western Area Region Manager, T. R. Murphy:

> ". . . I am sure you have learned additional capital has been made available to us for mini-market conversions. I am hopeful that the majority of these dollars will be spent in the Western Area. [¶] I am concerned, however, that . . . we are not getting the numbers of candidates from either Los Angeles or Anaheim. [¶] Would you please get into this right away. . . ."

Murphy then directed C. T. Fulkerson, the manager in charge of conversions in the Anaheim region, which included San Diego County, to evaluate all sites in his region for conversion.

ARCO's first analysis[2] of Nielsen's site, dated May 3, 1978, predicted the location was better suited for an auto

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[2]In deciding which sites to convert, math models were used by ARCO to assess data and project food sales, volume predictions (VP), for any particular sites converted. For food sales, the model added up five to ten factors, each based on data from the "primary trade area of a convenience store." Depending on the factor, the

parts retail outlet than a convenience food outlet. A second analysis done later that month showed food sales were predicted at "$160,000 annually" based on 16 hours per day operation which was below ARCO's benchmark minimum prediction of $200,000 food sales per annum for conversion. The results of this analysis were presented in a memorandum May 12, 1978, to Fulkerson, who in turn circulated it to ARCO's field agents, Robert Spear and Robert Abbott.

On August 10, 1978, Fulkerson called W. T. Ottman, an Arco mathematician and analyst, and asked him to rerun the math model projections on Nielsen's site using different demographic data: a 200 percent population increase, a housing density of 3,000 per square mile, and a 20 percent rental rate. At trial, Fulkerson could not recall giving Ottman any revised figures. These updated factors were rerun with the factors for percentage of $10,000-$15,000-income-families in the area and the secondary traffic count. The family income factor was based on 1970 data which Ottman opined would have decreased in eight years.[3] With these new numbers, the projected food sales increased from $160,000 to $240,000; housing density increased projected sales by $31,000 and the change in renter-occupied units increased VP by $50,000. These new figures justified converting Nielsen's site to a mini-market.

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primary trade area was defined as either a one-mile radius around the site or a one-mile square with the site in the center. A constant was then subtracted from the sum of the factors to arrive at the grocery VP. A minimum VP was developed for appropriate sites. If a particular site was below the minimum VP, it would not be converted.

[3]It is unclear from the testimony and the exhibits whether Ottman ran two or three of these early evaluations on Nielsen's site.

Meanwhile, even before this third analysis, ARCO representative Abbott had met with Nielsen several times to encourage him to think about converting.[4] Abbott told Nielsen ARCO had performed surveys on his site and thought it would be a successful unit. No specific sales figures were mentioned by Abbott during these meetings. Nielsen was borderline about converting because of traffic patterns and lack of foot traffic at his location.

Then, in September 1978, ARCO asked Nielsen and his wife to a presentation at the Bahia Hotel with several other dealers and their spouses. At the meeting, ARCO explained it had carefully analyzed each site, conducting "in depth studies" and "extensive research." It explained Nielsen's pump islands would be extended and more self-serve pumps added to ensure the increased sale of gasoline and groceries. Another dealer-lessee, Lawrence Lee Pierson, a friend of Nielsen's, gave a talk about his success after converting.

At the end of the meeting, Ramirez gave Nielsen a detailed profit and loss statement based on ARCO's third analysis of Nielsen's site purportedly reflecting the comprehensive study of factors showing predicted performance.[5] The key figures on this statement showed expected

[4]Abbott and other ARCO representatives, Edward Ramirez, Robert Spear, and Ken Wickerham, testified at trial Nielsen met with them at a restaurant near his station so they could explain the program to him. Nielsen did not remember such a meeting, and Spear did not recall any of the substance of the meeting.

[5]Ramirez testified the form he gave to Nielsen is no longer used when putting presentations together for prospective mini-market operators. At the time of Nielsen's presentation, Ramirez had been instructed by Jarvis to get everyone to convert. To help his own chances for promotions, Ramirez was motivated to present the data in a positive manner for ARCO, even though he knew the area around

annual grocery sales to be $240,000, gasoline to be 1,400,000 gallons,[6] the minimum store rent to ARCO as $2,000 a month, the minimum gas rent to ARCO as $394 a month, and Nielsen's net profit before taxes as $3,599 a month. Nielsen was not told about the first two evaluations.

Nielsen also received a brochure, entitled "Convenience for your Community" which outlined ARCO's experience and competence in analyzing prospective sites for mini-market convenience stores and in changing over conventional stations to mini-market facilities. He leafed through this brochure after the meeting and discussed the possible conversion with his wife and family; they were in favor of converting. He also discussed the conversion with his accountant, Willard Gendron. Gendron was not very encouraging, based on his knowledge of the area where Nielsen's station was located. Then Nielsen had another meeting with Abbott. This time, Ramirez was also included in the discussions. They explained the profit and loss statement Nielsen had been given at the Bahia meeting, emphasizing the totals stated were supported by ARCO's surveys.

Based on these figures, and his own earlier background in the grocery and gasoline businesses, Nielsen felt the 34 percent predicted increase over costs in food sales and the estimated gasoline output didn't seem out of the question. He understood he would still operate his normal

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Nielsen's site was "rather upper-middle-class" and without a lot of foot traffic.

[6]Nielsen's gasoline prediction had been raised from an earlier VP of 550,000 gallons per year to 1.4 million gallons based on converting full-serve equipment to self-serve and estimated price decreases. Nielsen's station, however, was already one-half self-serve.

16 hours[7] and not the 24 hours some mini-markets were operating, and his rent on the store would be $2,000 a month plus a graduated percentage above $2,000 based on sales. Nielsen decided to convert.

After another meeting with Abbott, Nielsen applied for a beer and wine license, borrowed over $26,000, secured by a second mortgage on his home, to pay for store inventory and other startup costs, let his mechanic of eleven years go, closed his service bays and referred his garage customers to other stations.

Early in May 1979, after Nielsen had signed all the new agreements concerning the conversion but before ARCO started construction, Fulkerson had prepared a fourth analysis of Nielsen's site. Because of cost increase factors and less gasoline sales, ARCO had decided to charge dealers for self-service equipment. The statement for Nielsen's site showed the deletion of "Additional Dispensers" and "Island Extension," a new store rent of $3,203 per month, rent of $313 per month for the self-service equipment, and an annual gas allocation of

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[7]Because of a conditional use permit, Nielsen could only remain open 16 hours a day. ARCO knew this restriction, and stated the hours of operation as 16 in his site analysis. Testimony at trial by ARCO executives highlighted the importance of a mini-market station being open 24 hours a day to be successful. We find it interesting ARCO would use the same figures it represented to Nielsen to allocate monies for the conversion based on VP of sales in a 16-hour a day operation when 24 hours was so vital to ensure success. The importance of hours became even clearer when Nielsen converted and struggled to make ends meet on a 16-hour operation and ARCO representatives kept hounding him to petition for an hours change.

587,486 gallons.[8] Nielsen was not told about this evaluation.

Also during the early part of May, ongoing internal memoranda routed within ARCO showed caution was warned in the representation of mini-market surveys and their results to prospective converters like Nielsen. Joseph J. Tebo, ARCO's Manager of New Marketing Techniques, cautioned the heads of the eastern and western areas for the mini-market program about quoting rent and VP's as the dealers were not told about the minimum criteria making up those factors and such could easily be misleading. Nothing, however, was said to Nielsen about VP amounts. He was told, however, about a possible rent change. Before construction started, Abbott visited him and said there would probably be a change in the formula for rent soon, but it was "not a big problem."

Later, toward the latter part of May, construction of the mini-market began. At that time, Nielsen discovered the pump islands were not being extended. Upset, he sent a mailgram to R. L. Jarvis, the ARCO manager for the Anaheim Region, inquiring: "Is Mini-Market being compromised at this location? Plans do not include pump island extensions and [more pumps]. Store success is tied to gas volume . . . ." Jarvis had the new mini-market representative, Ed Loza, call Nielsen and explain that "substantial [gasoline] volumes would be generated through existing equipment . . . ." Jarvis also sent Nielsen a letter drafted by an ARCO in-house lawyer inviting Nielsen to back out of the conversion if he was uncomfort-

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[8]The 587,486 was Nielsen's allocation of gasoline under federal regulations and the gas shortage caused by the Iranian oil crisis. While Nielsen knew there was an ongoing gasoline allocation, ARCO only apprised him of his 1.4 million VP.

able with it. Nielsen, however, was already too far into the conversion to abandon the venture.

In June 1979, Nielsen attended a two-week ARCO training school in El Monte, California, for operation of the mini-market and self-serve station. Thereafter, ARCO representatives Loza and Spear gave Nielsen advice on startup inventory and how to stock the groceries. The converted facility with mini-market and self-serve pumps opened August 4, 1979.

Over the next 20 months (August 1979 to March 1981), Nielsen's gasoline sales never exceeded 67,000 gallons per month and his grocery sales never exceeded $13,000 per month. With the signing of his AM/PM Mini-Market franchise agreement in December 1979, his rent went up. By July of 1980, Nielsen's debts became unmanageable and his disposition changed. (To be explained more fully in section V, *post.*) He asked Abbott what he should do, and after reviewing Nielsen's books with him, Abbott suggested he sell the unit.

In November 1980, Nielsen found a buyer for the unit subject to ARCO's consent to assign the franchise-lease agreement. After qualifying financially, the buyer did not satisfactorily complete ARCO's training course, and ARCO rejected assignment of the franchise-lease in March 1981.[9] Nielsen then gave notice to ARCO and turned the keys over to PSI on April 1, 1981.

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[9]Nielsen's three causes of action on which the jury found no ARCO liability concerned the sale-assignment of the franchise-lease for the market and station to Werner Stroebel. The jury specifically found ARCO had acted reasonably when it withheld its approval of the assignment to Stroebel.

III

The court instructed the jury Nielsen was seeking "to recover damages he claims to have sustained as a result of the alleged fraudulent misrepresentations or concealment practiced by [ARCO]." The judge then read the jury the six elements of fraudulent misrepresentation and the five elements of fraudulent concealment, explaining either theory would support a finding of fraud for finding liability on count one.[10] The judge defined proximate cause for

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[10]The specific instructions read to the jury were:

"The essential elements on the theory of fraudulent misrepresentations are[:] First, that the defendant must have made a representation as to a past or existing material fact.

"Second, the representation must have been false.

"Third, the defendant must have known that the representation was false when he made it, or must have made the representation recklessly, without knowing whether it was true or false, which is treated the same as knowing that it is false.

"Fourth, the defendant must have made the representation with an intent to defraud; that is, he must have made the representation for the purpose of inducing the plaintiff to rely upon it and to act or refrain from acting in reliance on the misrepresented facts.

"Fifth, the plaintiff must have been unaware of the falsity of the representation. He must have acted in reliance upon the truth of the representation, and he not only must have acted in reliance, but he must have been justified in so relying. In other words, must have reasonably relied.

"And the sixth, that as a proximate . . . result of his reliance upon the truth of the representation, the plaintiff must have sustained damage.

". . . . .

"[T]here are five elements of the concealment theory: First, if he concealed or suppressed a material fact.

the jury and also clarified the elements of each instruction:

"Ordinarily expressions of opinion are not treated as representations of fact upon which a claim for fraud may be based, and ordinarily statements respecting future sales, expenses, and profits of a business are considered statements of opinion and would not ordinarily be representations of existing facts. The determination as to whether a particular statement was an expression of opinion or should be treated as a representation of fact is dependent upon all of the facts and circumstances existing at the time that the statement was made.

"In the following circumstances, however, an expression of opinion may form the basis of a claim for fraud; that is, under these special circumstances, what would otherwise be an opinion may be treated as a misrepresentation of fact: If the party expressing the opinion does not honestly believe it, or if the party expressing the opinion holds himself out as possessing superior knowledge or special information regarding the subject of the opinion, and as a result, the opinion is expressed in such a manner that the other party reasonably believes the expression is a representation of fact and not merely an opinion; or

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"Second, that he was under a duty to disclose the fact to the plaintiff.

"Third, if he intentionally concealed or suppressed the fact, with the intent to defraud the plaintiff.

"Fourth, if the plaintiff was unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact.

"And fifth, if as a result of the concealment or suppression of the fact the plaintiff sustained damage."

if a party states something that might otherwise be only an opinion, but does not state it as a mere expression of opinion, but rather, gives it in such a manner as to suggest it is a statement of fact, so that the other party might reasonably treat it as a fact and rely and act upon it as such.

". . . . A party claiming to have been defrauded by a false representation must have relied upon the representation; that is, the representation must have been a proximate cause of his conduct in entering into the transaction, and without such representation he would not have entered into it.

"The fraud, if any, does not need to be the sole proximate cause if it appears that reliance upon the representation substantially influenced the party's actions, even though there may have been other influences at work as well.

"Reliance upon a representation may be shown by direct evidence, or may be inferred from the circumstances; by circumstantial evidence, in other words.

"A party claiming to have been defrauded by a false representation must not only have acted in reliance upon it, but must have been justified in such reliance. That is, the situation must have been such as to make it reasonable for him, in the light of the circumstances and his intelligence, experience, and knowledge, to accept the representation without making an independent inquiry or investigation of his own.

"If a party claiming to have been defrauded does make an independent investigation of the subject matter of the alleged false representation, and if his decision to engage in the transaction is the result of his independent investigation and not a result of his

reliance upon the representation, then he would not be entitled to recover.

" . . . .

"[W]here material facts are known to one party and not to the other, the failure to disclose them is not actionable fraud unless there is some relationship between the parties which gives rise to a duty to disclose such known facts.

"A duty to disclose known facts arises where one party knows of material facts — by 'material' we mean something that might reasonably be expected to influence the other party's actions — where one party not only knows of material facts but also knows that such facts are not known or readily accessible to the other party.

"Moreover, where one party is under no duty to speak if the circumstances are such that he might have remained silent, but nevertheless he does speak, he is then bound to speak honestly and not to engage in misleading half-truths or the suppression of facts which materially qualify those that were stated."

ARCO argues the trial evidence shows the volume figures Nielsen says he relied upon to agree to the conversion, the $240,000 food and 1.4 million gallons of gasoline sales, were honestly believed by ARCO to be true indicators of how a properly managed mini-market and self-serve station at Nielsen's site would perform; ARCO used the same figures to justify its own $140,000 expenditure for the conversion. ARCO also disputes Nielsen's claim the figures are inaccurate and that he reasonably relied on them in light of his background in grocery retail and gasoline sales and discussions before the conversion with his family, his accountant, and two dealer-lessees

who had already profitably converted their stations. ARCO claims Nielsen's failure to meet the sales projections was based on his own mismanagement and cannot support an inference the projections were false or fraudulent when made.

The jury chose to disbelieve testimony offered by ARCO representatives the figures for the food projection were accurate. It chose to believe instead the figures were inaccurate, that ARCO knew they were inaccurate or should have checked to see if they were true, that ARCO represented the figures as true, that Nielsen justifiably believed they were true, that he relied on such to his detriment in converting his station, and that if he knew the true facts he would not have converted. We find the jury's decisions substantially supported in the record.

Based on all the facts and circumstances existing at the time Nielsen signed the agreement to convert, the jury could reasonably infer ARCO representatives, who were in a position of superior knowledge concerning the minimum criteria and factors making up the VP's represented to Nielsen, presented the VP's to Nielsen in a manner suggesting their superior knowledge and suggesting the VP's were more than opinions of what sales were expected in the future. Both Ramirez and Abbott told Nielsen extensive surveys were done to obtain those numbers, and that based on those numbers his site would be successful. Both knew Nielsen did not know the minimum criterion for conversion and the survey information used to calculate the VP's or have ready accessibility to such information without their disclosure.

The jury could additionally infer the figures used in the analysis presented to Nielsen were inaccurate based upon over-inflated numbers for the population growth, housing unit density and renter-occupied units and the use of the

1970 figure for low-income families. The jury apparently did not believe Fulkerson's explanations for his use of the larger numbers in the math model, finding Ottman's written memoranda Fulkerson gave him the figures more solid evidence than Fulkerson's loss of recall. As ARCO concedes, the jury had before it an exhibit showing some evidence the 3,000 number used for the housing unit density factor was not accurate and Ottman ignored the data in his own files on the direction of Fulkerson.

Moreover, as noted before, there was abundant testimony the VP was predicated upon 24 hours operation for success of a converted station while Nielsen's operation was legally only 16 hours. The jury could thus have drawn the inference the VP's were even more inflated and unattainable for a business not operating around the clock and that ARCO representatives were being dishonest when they said they believed the factors and VP's to be true.

While Nielsen did independently discuss the matter of conversion with his family, his accountant, and with other service station owners, it was only after his discussions with Abbott and Ramirez after the Bahia meeting that he agreed to convert. Although Abbott knew about the results of the second analysis, he did not disclose those to Nielsen so Nielsen could consider the full picture before converting. The court properly instructed the jury it could find ARCO liable if it found Nielsen justifiably relied upon ARCO's representations even if Nielsen also considered other reasons, such as his family's enthusiasm for converting.

In light of the nationwide push by ARCO to convert conventional gasoline stations, Abbott's concealment, and Ramirez's determination to convert every site, it is not unreasonable the jury found Nielsen justifiably relied on

ARCO representations to his detriment in converting his station. As the trial judge stated after the jury returned its verdict:

> "Your verdict, in my opinion, is entirely consistent with the evidence you heard. It could have gone the other way, but reasonable minds differ, and I see nothing inconsistent with the evidence you heard in this case, in this courtroom."

The jury's verdict is supported by the record.

IV

ARCO next claims prejudicial evidentiary error, arguing the court improperly admitted Judith Roberson's hearsay testimony. This same ground was raised as a basis for ARCO's new trial motion and denied. The trial court found there was no error but if there was "it was either harmless or invited, and in any case, inconsequential to the outcome." We agree any error was harmless.

At the close of testimony, Nielsen sought to introduce in rebuttal the purported expert testimony of Roberson, secretary-treasurer of the "Coalition of AM/PM Dealers," that one-fourth of the AM/PM dealers in the western region are in serious financial difficulty. Her opinion was based upon personal experience and a random telephone survey[11] she and Paul Mann, president of the association, conducted the week before she testified.

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[11]Roberson and Mann talked with 33 of the 300 AM/PM dealers, asking each four questions: (1) "How much money did you make in 1984?" (2) "How much money did you make in the first six months of 1985?" (3) "Have you injected any capital back into the business?" and (4) "How many hours a week are put in by you or unpaid family members, or how many hours are you personally putting into the business?"

ARCO objected on grounds of relevance and improper rebuttal.

Outside the presence of the jury, the court inquired into the scope and relevance of the testimony. Nielsen asserted Roberson was testifying as an expert as to the dealers' financial well-being based upon the study she conducted and her personal interaction with the dealers in her capacity as an officer of the association. Roberson would give her opinion as to what proportion of the 300 AM/PM dealers are experiencing serious financial difficulty and opine what is a fair return on their investment of time and money. He argued these opinions were necessary to impeach ARCO's testimony that dealers in 1984 averaged $80,000 a year income (Mr. Reilly) and made $9,000 a month profit as of July 1985 (Mr. Stanworth) and that such was also necessary to rebut the beautiful financial picture painted by the AM/PM dealers ARCO called as witnesses. Specifically, Nielsen offered Roberson would state one-quarter of the 300 dealers are in serious financial difficulty and had to put money back into their businesses in the last 18 months.

ARCO again objected, this time on grounds of inadmissible hearsay. The judge tentatively ruled:

> "The objection is largely sustained on the grounds of lack of foundation and inherent inability to lay a foundation of expert knowledge which I think, in this field, would require a scholarly study, either an academic study or an accounting study of what standards of self-evaluation were being used and what standards ought to be used by different dealers. It has the potential of being very prejudicial.
>
> "I will allow one narrow element of the proposed testimony to come in by way of rebuttal . . . to put

> things in proper perspective, and that is, the witness may testify that, of the [33] dealers she polled . . . 26 out of the 33 claim not be doing very well."

After further discussion and objections, and a brief recess, the court formally ruled:

> "[T]his is in principle proper impeachment; that the question is the competency of the witness to express opinions based on anecdotal material.
>
> ". . . . .
>
> "[A]ccordingly, the tentative ruling will be my ruling, just to put things into focus a little bit, and to properly rebut the rather glowing impression given by a couple of defense witnesses, particularly the Rancho Bernardo dealer.
>
> "I will let Mrs. Roberson testify that, according to her, just in general words . . . one-quarter professed to be dissatisfied with their income as dealers, or were doing badly, or something in general words, whatever words she chooses to use . . . ."

ARCO then noted its objection for the record "that this is not expert testimony." The court responded its ruling "in effect finds [Roberson] is an expert for the purpose of expressing an opinion as to what percentage of the dealers are unhappy with their lot."

Roberson then testified in accordance with the court's ruling. ARCO contends Roberson's testimony, even in this limited form, was inadmissible hearsay, she was not a qualifed expert, her statements did not qualify as an expert opinion, and her testimony coming at the very conclusion of the case was highly prejudicial.

Generally, the trial court's determination of an expert witness is seldom disturbed on appeal. (*People* v. *Kelley*

(1976) 17 Cal.3d 24, 39.) However, where there is no evidence in the record, as here, the purported expert has "special knowledge, skill, experience, training, or education" to qualify her as an expert on the "subject to which [her] testimony relates" (Evid. Code, § 720, subd. (a)), it is an abuse of the court's discretion to so qualify her.

Initially, after hearing Nielsen and Roberson out of the jury's presence outline the basis for her testimony, i.e., her experience and contacts with AM/PM dealers as secretary of their dealers' association and her random telephone survey, the court ruled there was a lack of foundation and an inherent inability to lay a foundation of expert knowledge concerning the financial standards of the different dealers. No additional basis for her expertise was presented to justify the court finding Roberson "in effect . . . an expert." While a qualified expert may give an opinion based on reliable matter furnished by another person (Evid. Code, § 801) even though that information is hearsay and is based on statements made by that other person who is not testifying at trial, such testimony given by a lay witness is inadmissible hearsay. (Evid. Code, § 1200; *People* v. *McDaniels* (1980) 107 Cal.App.3d 898, 905.) What would have been proper rebuttal testimony, relevant and admissible to contradict testimony of ARCO's witnesses (Evid. Code, § 780, subd. (i); *Kennemur* v. *State of California* (1982) 133 Cal.App.3d 907, 922-925) if Roberson had been a qualified expert witness, was erroneously admitted. This error, however, was harmless.

At trial, certain of ARCO's witnesses testified the average AM/PM dealer income in 1984 was over $80,000, a fact from which the jury could infer the dealers were prospering and not experiencing any financial difficulties in 1984. ARCO's defense to Nielsen's action was Nielsen's

mismanagement caused his own financial dissolve; other dealers who properly followed ARCC's directions were profitable and financially solvent. Roberson's testimony was intended to negate ARCO's rosy financial picture of AM/PM dealers in 1984 and 1985. Nielsen's complaint, however, as tried to the jury, concerned fraud and deceit in 1978 and 1979. The financial situation of ARCO dealers in 1984 and 1985 was, at best, marginally relevant.[12]

It also was cumulative of other evidence in the case. ARCO witnesses testified independent dealers were preferred over PSI for operation of the AM/PM mini-market stations; operation by independent dealers was more profitable. PSI would come in to operate stations usually in emergency situations. Tebo, an ARCO official, stated 130 of 400 units in the western division were presently being operated by PSI. The jury could have reasonably inferred a certain percentage of AM/PM dealers had financial difficulties and PSI had taken over.

Additionally, contrary to ARCO's assertion Roberson's testimony left the impression almost 80 percent of the dealers were having financial hardships, she stated on direct examination the survey polled only 33 of 300 AM/PM dealers. Then on cross-examination Roberson stated she could not conclude 80 percent of the dealers were experiencing financial difficulties and are unhappy with their units.

Although it was error to admit it, the trial court strictly limited Roberson's testimony. Neither counsel mentioned her testimony in closing argument, though ARCO did mention again the financial success of its dealers.

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[12]Earlier in the trial, Neilson objected to the admission of the testimony by ARCO's witnesses as to how dealers were doing in 1984 and 1985 on relevance grounds. The court overruled the objection.

In light of the total circumstances and extensive testimony adduced at trial, and the substantial evidence supporting the fraud and concealment cause of action, it is not probable the jury would have reached a different result in the absence of Roberson's brief testimony. No prejudice is shown. (*People* v. *Pike* (1962) 58 Cal.2d 70, 92-93.)

V

ARCO also contends the damages awarded by the jury are excessive and not supported by the law or the evidence. The jury awarded Nielsen $525,788 in compensatory damages, consisting of $396,727 for other economic damages, $79,061 for out-of-pocket damages and $50,000 for emotional distress, and $3.5 million in punitives. ARCO specifically argues the compensatory damage award should be reversed because the trial court used the wrong measure of damages, Civil Code section 3343[13] rather than section

[13]All statutory references are to the Civil Code unless otherwise indicated.

Section 3343, as amended in 1971, provides:

"(a) One defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction, including any of the following:

"(1) Amounts actually and reasonably expended in reliance upon the fraud.

"(2) An amount which would compensate the defrauded party for loss of use and enjoyment of the property to the extent that any such loss was proximately caused by the fraud.

"(3) Where the defrauded party has been induced by reason of the fraud to sell or otherwise part with the property in question, an

3333,[14] that even if section 3343 applies, the award for lost profits was improper and excessive, the trial court erroneously omitted the proximate cause requirement in the jury instruction for damages under section 3343, the out-of-

amount which will compensate him for profits or other gains which might reasonably have been earned by use of the property had he retained it.

"(4) Where the defrauded party has been induced by reason of the fraud to purchase or otherwise acquire the property in question, an amount which will compensate him for any loss of profits or other gains which were reasonably anticipated and would have been earned by him from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud, provided that lost profits from the use or sale of the property shall be recoverable only if and only to the extent that all of the following apply:

"(i) The defrauded party acquired the property for the purpose of using or reselling it for a profit.

"(ii) The defrauded party reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.

"(iii) Any loss of profits for which damages are sought under this paragraph have been proximately caused by the fraud and the defrauded party's reliance on it.

"(b) Nothing in this section shall do either of the following:

"(1) Permit the defrauded person to recover any amount measured by the difference between the value of property as represented and the actual value thereof.

"(2) Deny to any person having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled."

[14]Section 3333 states:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

pocket damages are unsupported by the evidence, and the emotional distress damages are not recoverable under section 3343 and are excessive. ARCO then challenges the punitive damage award on grounds it is excessive, does not bear a reasonable relationship to the actual damages suffered and resulted from improper and highly prejudicial evidence.

ARCO's motion for new trial on these same grounds was denied. Generally, the denial of a new trial requires we affirm the award unless it is not based on the law or is so grossly disproportionate on any reasonable view of the evidence as to raise a strong presumption it is based on passion or prejudice. (*Schroeder* v. *Auto Driveaway Co.* (1974) 11 Cal.3d 908, 919.) "And although the trial court's determination is not binding upon a reviewing court, it is to be accorded great weight because having been present at the trial the trial judge was necessarily more familiar with the evidence." (*Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 64.) This standard applies to both awards of actual damages and to an award of exemplary damages. (*Lawson* v. *Town & Country Shops, Inc.* (1958) 159 Cal.App.2d 196, 204.) Applying this standard, we now address each category of damages in light of the record.

A.
COMPENSATORY DAMAGES

In limine, counsel submitted written briefs on the issue of what measure of damages should apply to the fraud and concealment cause of action. ARCO asserted, as it does now, section 3333, the general tort measure of damages, applies. Nielsen contended section 3343, the section providing damages for fraud in the purchase, sale or exchange of property, should apply. The court heard

argument and deferred the matter for ruling. After Nielsen's witness Jerry Garner, a broker, was qualified as an expert and began testifying as to the anticipated profits of the converted station, ARCO objected on grounds of irrelevancy if section 3333 applied. Pressed to make a ruling, the court stated:

> "I am frank to say that I simply do not have a high degree of confidence in what the correct answer is; and therefore, as a matter of judicial economy and expediency, I am overruling the objection, without prejudice to possible further motions later on, in the belief that probably all this evidence is going to be admissible if it is subjected to proper instructions to the jury at the time the case is presented to them.
>
> "I think the combination of proper instructions, competent argument, and the well tailored special verdict can adequately preserve the issue; and if I have occasion to reconsider after a jury verdict, then my mind is not a hundred percent closed."

ARCO again objected when Nielsen's expert David Royce Streiff, a CPA, testified to Nielsen's projected loss of income. The court stood by its earlier ruling. After the jury verdict was entered in Nielsen's favor finding damages under section 3343, ARCO moved for a new trial on the grounds that section was inapplicable to the facts of this case. The motion was denied. We consider whether that ruling was correct and whether section 3343 applies in this case.

When interpreting a statute we first look to its plain language. (*Great Lakes Properties, Inc.* v. *City of El Segundo* (1977) 19 Cal.3d 152, 155.) Its scope turns on the meaning of that express language which we give its usual ordinary import unless otherwise stated. (*Califor-*

nia Teachers Assn. v. *San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) Section 3343, by its words, applies to "[o]ne defrauded in the purchase, sale or exchange of property. . . ." The Civil Code provides "[t]he ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others" and "the thing of which there may be ownership is called property." (§ 654.) The code further provides: "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trade-marks and signs, and of rights created or granted by statute." (§ 655.) " 'When unqualified the term [property] is sufficiently comprehensive to include every species of estate, both real and personal, whether choate or inchoate . . . whether corporeal or incorporeal. . . .' " (*Hunt* v. *Authier* (1946) 28 Cal.2d 288, 295, quoting *Ponsonby* v. *Sacramento Suburban Fruit Lands Co.* (1930) 210 Cal. 229, 232.) The term property in section 3343 is unqualified. It follows then that Nielsen's conventional gasoline station leasehold, and the business rights involved therein, is a "thing" that Nielsen had the right to possess and use to the exclusion of others. It was thus in his ownership.

The mini-market leasehold would likewise be a thing that Nielsen had the right to possess and use to the exclusion of others under the converted leasehold. The question remains whether Nielsen obtained the mini-market leasehold by "purchase, sale, or exchange."

Purchase is defined in Black's Law Dictionary as "Transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration" and "[i]n a technical and broader mean-

ing relative to land, generally means the acquisition of real estate by any means whatever except by descent." (Black's Law Dictionary (5th ed. 1979) p. 1110.) An exchange is: "To part with, give or transfer for an equivalent." (*Id.* at p. 505.)

Based on this approach, Nielsen would fall squarely under the scope of section 3343. He had lessee ownership of the conventional service station premises and business and by agreement with ARCO converted or exchanged such for lessee ownership of a mini-market self-serve station. One could additionally say the agreement was founded on valuable consideration, the tearing down of the existing facilities and building and closing the old business for the right to have new facilities built and opening a new business.

While we have not found in our research a case precisely on point, our decision in *Hartman* v. *Shell Oil Co.* (1977) 68 Cal.App.3d 240, presented a closely analogous situation. There, in reliance upon representations Shell Oil Company (Shell) would either expand an old existing Shell Oil station or transfer him to a new American Oil station across the street, if purchased by Shell, Hartman executed Shell's form, a dealer's agreement and dealer's lease and promissory note, thereby "purchasing" the Shell station. (*Id.* at p. 243.) After reviewing the evolution of California law regarding property transaction fraud damages, we determined Hartman was entitled under section 3343 to "loss of profit or other gains which were reasonably anticipated and would have been earned by him from the use or sale of [the station] had it possessed the characteristics fraudulently attributed to it . . . ." (§ 3343, subd. (a)(4)(i).) We further determined that the lost profits portion of section 3343 was applicable even though the fraudulent representations in question,

that the property leased would be upgraded, expanded on the condition specified, did not concern the physical characteristics of the property leased. (*Id.* at p. 248.)

Here, while we have no evidence of a promissory note involved as there was in *Hartman*, we have the same type of relationship involved: the independent dealer being induced by an oil company to enter into a lease to sell its gasoline and run a business on a site where the company provides land, a building and equipment to accomplish such purpose. As with ground leaseholds, we find here an unique lessee-lessor situation where, in essence, the independent dealer is buying an estate, consisting of land and buildings and a business consisting of selling gasoline and other products, i.e., convenience-type foods, to use and operate for an agreed period. The "purchase price," in the form of rent and other obligations, is to be paid in installments and the lessor-oil company retains the right to retake possession it the lessee defaults or somehow terminates the lease. This right would be comparable to a lender's right to foreclose under a power of sale.

The fact the AM/PM convenience store agreement of December 28, 1979, states Nielsen as an operator-dealer has "exclusive control of the Store and all activities conducted therein and therefrom" and "shall continuously display at the Store in a conspicuous manner at a point visible and accessible to the public a legible sign showing that Operator[-dealer] is the owner of the business being conducted therein and thereon," is additional evidence of this special relationship. The agreement further states it's the premises and store equipment that is leased. In effect, ARCO is treating Nielsen as the "owner" of the business. Because of this unique dual-nature of Nielsen's leasehold interest in the property, we see no reason not to find him fitting within the parameters

of section 3343, and we so find. We now turn to the remedies allowed under section 3343 and ARCO's specific contentions.

Section 3343 allows recovery for out-of-pocket losses (the difference between the value of what the defrauded person paid or parted with and the value of what he actually received) (*Bagdasarian* v. *Gragnon* (1948) 31 Cal.2d 744), additional consequential damages which are the proximate result of the fraud (*Garrett* v. *Perry* (1959) 53 Cal.2d 178, 186), punitive damages (*Bagdasarian* v. *Gragnon, supra*, 31 Cal.2d 744 at p. 763), and, since its amendment in 1971, any additional damages arising from the particular transaction, including lost time and money reasonably expended in reliance (subds. (a)(1) & (a)(2)) and lost profits (subds. (a)(3) & (a)(4); *Stout* v. *Turney* (1978) 22 Cal.3d 718, 727).[15]

ARCO's contention Nielsen's anticipated lost profits are not recoverable has been answered by *Hartman* v. *Shell Oil Co., supra*, 68 Cal.App.3d 240 at p. 247, which stated such are allowable under the amendments to section 3343. ARCO, however, further claims "the sales and profit projections" fraudulently represented to Nielsen are not "characteristics" possessed by property. ARCO argues the fraud must relate to attributed physical characteristics of property which profits and sales are not. This claim, as noted earlier, was also addressed in *Hartman* (at pp. 247-248). We hold the plain language of that section does not limit characteristics of property to physical characteristics. (*Ibid.*) Where one is able to have ownership of intangible property it would be an anomaly

[15]For a complete historical review of section 3343, see *Stout* v. *Turney, supra*, 22 Cal.3d 718 at pp. 725-727, and *Hartman* v. *Shell Oil Co., supra*, 68 Cal.App.3d 240 at pp. 243-249.)

to require inchoate interests or intangible property to possess physical characteristics. This contention is meritless.

Next, ARCO asserts the finding of anticipated lost profits cannot stand because the trial court's instruction on section 3343 erroneously omitted that section's proximate cause requirement. While the court did omit sections of the specific instruction, the record reflects the jury was thoroughly apprised in closing arguments by counsel and instructed by the court on proximate cause and the fact any damage to be recoverable had to be caused by the fraud or concealment. Any error was therefore harmless.

ARCO also contends the amount of compensatory damages awarded by the jury was excessive. As noted earlier, where the trial court denied a motion for new trial on these grounds, we are required to uphold that decision if the amounts are at all reasonable and within the range of evidence. (*Chavez* v. *Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 125.) "The fact . . . the reviewing court cannot . . . arrive at the exact figure used in the judgment should not be fatal." (*Benson Elec. Co.* v. *Hale Bros. Assoc., Inc.* (1966) 246 Cal.App.2d 686, 695.)

Nielsen's expert Mr. Garner estimated Nielsen's business would have brought $67,000[16] in profit before taxes in 1985 based on the $3,599 a month profit projected by ARCO and an 8.52 percent per year inflation rate. He valued the business as of July 1, 1985, at $184,244, which included a $21,181 inventory and $163,000 in good will. By using comparable sales of other gasoline stations, he valued the business a second time at $213,329 with

[16]We make no attempt to reconcile the figures given by the various experts.

$76,000 of that figure from income. Garner explained he had used a 40 percent capitalization rate and a 12 percent return for this calculation, assuming certain changes had occured and that there was little risk.

Nielsen's expert Mr. Streiff testified that if the property had possessed the characteristics attributed to it by ARCO, Nielsen would have earned $143,871 more than he actually earned from August 1979 until the time of trial. Adding 10 percent per year simple interest, the amount of lost profits would be $185,613. He also computed 5 percent and 10 percent growth trend for the pretrial projected income-profits. His pretrial figures were based on the difference between Nielsen's supported profits from the mini-market from the opening of the mini-market until the time of trial as if ARCO's profit and sales projection had proven true and Nielsen's actual profits and wages.

Streiff then testified Nielsen's projected future losses, assuming Nielsen worked full time until age 70 would be $104,518; with 5 percent growth trend, $227,473; and with 10 percent growth trend, $412,860. Streiff also gave testimony on post-trial profits assuming Nielsen worked up to ages 65 and 75, respectively.

In his most conservative calculation, Streiff computed the net present value of Nielsen's future losses as $139,242 by deducting the loss "prior to June of 1985 of $185,613 from the total of $324,855 . . . ."

ARCO's expert, Ms. Sheila Ann Teisher, testified the value of Nielsen's business before the conversion was $42,111, his total loss was $79,061, and that based on what one buyer was willing to pay for the business in November 1981, $52,900, his only out-of-pocket loss, the difference between what he gave up and what he received, was $26,161. She reviewed Streiff's deposition, working

papers and testimony, and commented he had not calculated the amount Nielsen had actually lost; he did not deduct for depreciation; his analysis assumed a risk-free income. To arrive at her figures, Teisher took gross profit less operating expenses. She opined Nielsen's average income weighted over five years was $14,367 and noted that in 1982 he actually earned $1,320 more than that weighted average. She also noted only in 1980 and 1981 did he do worse than before the conversion. In reviewing Nielsen's books from 1974-1979, she opined his business was actually declining rather than prospering before the conversion.

The jury awarded $79,061 for out-of-pocket damages and $396,727 for other economic damages. ARCO alleges that while these figures are within the range of damages testified to by Nielsen's experts, such are not supported by the facts of the case. Because Nielsen abandoned the leasehold property on April 1, 1981, ARCO claims it is inconsistent with the assumption the jury would have had to have made, that Nielsen held onto the business up to the time of trial or until he was 65, 70 or 75, to award the amount awarded for anticipated profits. ARCO also claims the jury improperly awarded out-of-pocket damages without subtracting anything for the value Nielsen received and included that out-of-pocket sum with the other economic damages, thereby giving Nielsen a double recovery of those amounts.

While Nielsen only operated the mini-market station from August 4, 1979, until April 1, 1981, section 3343 and its amended sections allow for recovery of anticipated lost profits to restore the plaintiff to the financial position he would have enjoyed.

The trial judge instructed the jury they were not bound by the experts' assumptions but could weigh their opin-

ions considering their qualifications, credibility, and the reasons for their opinions. The jury had before them all the experts' financial worksheet exhibits. Different combinations of these factors supported by the evidence could have been made by the jury to reach the awards. For out-of-pocket damages, recovery is not limited to the values at the time of the alleged fraudulent transaction; the recovery may be measured as of the date the promise was breached. (*Glendale Fed. Sav. & Loan Assn.* v. *Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 146.) The projected range amounts are supported by the evidence and consistent with the facts.

ARCO could have tailored the special verdict findings given to the jury to reflect what was included in the "other economic damages" they awarded; it did not. Viewing the entire record in the light most favorable to the judgment compels the conclusion the awards of out-of-pocket damages and other economic loss damages are not excessive and were not the result of passion or prejudice on the part of the jury. (*Bertero* v. *National General Corp., supra,* 13 Cal.3d 43 at pp. 64-65.)

Emotional distress damages, however, were improperly awarded under section 3343. The trial court ruled in an abundance of caution emotional distress damages were recoverable under section 3343, subdivision (b)(2). Consistent with that ruling, Nielsen, a psychiatrist, Calvin R. Colarusso, Nielsen's wife and two former employees of Nielsen testified to Nielsen's dramatic psychological mood changes and physical changes after the station's conversion. Nielsen alleged as part of his fraud and concealment cause of action he suffered anger, embarrassment, worry and disappointment caused by the station never coming close to achieving the sales and profits represented by ARCO.

Normally, section 3343 is the exclusive measure of damages for fraud in the purchase of property, and mental distress damages are not available in such an action. (*In re Marriage of McNeill* (1984) 160 Cal.App.3d 548; *Channell* v. *Anthony* (1976) 58 Cal.App.3d 290, 315; *O'Neil* v. *Spillane* (1975) 45 Cal.App.3d 147, 158-159.)

> "The provisions of section 3343 to the effect that the defrauded person may also recover any 'additional damage' arising from the particular transaction and that nothing in the statute shall be deemed to deny to such a person 'any legal or equitable remedies' to which he may be entitled, do not indicate that any other *measure of damages* may be applied. The right to recover *additional* damages does not refer to the *measure* of damages, but, rather, to such matters as expenses or other consequential injury resulting from the fraud." (*Bagdasarian v. Gragnon, supra,* 31 Cal.2d 744 at pp. 762-763, emphasis in original.)

Certain exceptions to this exclusivity rule have evolved when a fiduciary is involved in the misrepresentations (*Pepitone* v. *Russo* (1976) 64 Cal.App.3d 685, 688-689), when a separate cause of action is stated for intentional or negligent infliction of emotional distress (*Godfrey* v. *Steinpress* (1982) 128 Cal.App.3d 154, 173), or when the cause of action for which damages are sought is an action for deceit sounding in tort and not for deceit in inducing the agreement. Under these situations, damages are available in deceit under sections 1709[17] and 3333, and not 3343. (*Sprague* v. *Frank J. Sanders Lincoln Mercury, Inc.* (1981) 120 Cal.App.3d 412, 417.)

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[17]Section 1709 states: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

Here, the first cause of action for fraud and concealment alleged ARCO intentionally misrepresented and concealed facts concerning gross sales and profits Nielsen could expect from the station after conversion. In essence, his cause of action sounds in fraud in the inducement of the new owner/leasehold agreement; the action is thus grounded upon the agreement and not upon a duty separately springing from the agreement. (See *Sprague* v. *Frank J. Sanders Lincoln Mercury, Inc., supra,* 120 Cal.App.3d 412 at pp. 418-419.) Nielsen did not allege any fiduciary duty and did not separately bring cause of action for intentional infliction of emotional distress. Under these circumstances, an award for emotional distress was improper under section 3343.

B.

PUNITIVE DAMAGES

ARCO claims the $3.5 million punitive damages award is excessive, does not bear a reasonable relationship to the actual damages suffered and resulted from improper and highly prejudicial evidence. ARCO infers that without the inadmissible evidence, the exemplary damages are not supported by the evidence. We review these assertions in reverse order.

(1) Evidentiary Issues

"In order to justify an award of exemplary damages, the defendant must be guilty of oppression, fraud or malice. (Civ. Code, § 3294.) He must act with the intent to vex, injure or annoy, *or with a conscious disregard of the plaintiff's rights.*" (*Silberg* v. *California Life Ins. Co.* (1974) 11 Cal.3d 452, 462, emphasis added.) Intentional fraud has long been sufficient to support an award for

punitive damages. (*Bagdasarian* v. *Gragnon, supra,* 31 Cal.2d at p. 763.)

Just as our earlier review of the evidence substantially supported the jury's finding of intentional fraud and concealment, so too does the evidence convince us there was sufficient evidence from which the jury could reasonably have found ARCO, through its agents, intentionally concealed facts from, and made representations to, Nielsen with an intent to have him rely thereon, in conscious disregard of his rights, thus entitling Nielsen to punitive damages.

Nevertheless, ARCO contends the trial court erroneously admitted three portions of evidence which together with the earlier alleged inadmissible testimony of Roberson tainted the jury's view of the evidence in finding fraud sufficient for punitive damages. Showing the jury exhibit 226 in its entirety, admitting evidence of advice given ARCO representative Ramirez by an ARCO attorney concerning use of projected sales forms, and admitting evidence of Nielsen's life and circumstances, all prejudiced the jury against ARCO.

Exhibit 226, a memorandum from Tebo to the eastern and western mini-market area program directors, was briefly shown to the jury during Nielsen's opening statement. The first paragraph of that exhibit, stating in part, "[t]here has been an increasing number of situations reported to Legal where dealers have felt they were misled when agreeing to take an ancillary business," was later not allowed into evidence. The balance of the memorandum came into evidence with Tebo's testimony. This part directed dealers be given the sales and profits data "in purely hypothetical terms."

Ramirez was allowed to testify, over ARCO's objection. that a female ARCO attorney instructed ARCO's field representatives not to use the sales and profit projection forms because they may be misleading. After further testimony, the court recessed, took argument on the earlier objection, and reversed its ruling. The court asked ARCO if it wanted "to highlight [the statement] by having the jury instructed now, or to save it for argument." Before cross-examination, the court advised the jury it had reconsidered one fragment of Ramirez's testimony and had sustained ARCO's objection to it. The court instructed the jury to "disregard the testimony about the statement made by the company attorney to a large meeting of company employees sometime in 1979" and struck the testimony.

ARCO argues the first paragraph of exhibit 226 combined with the inadmissible comments by Ramirez and the court's admonishment to the jury to disregard such improperly led the jury to conclude ARCO had a policy or practice of misrepresenting facts and thus allowed them to award excessive punitive damages. In the first instance, ARCO's objection is not embellished in the record; the basis for sustaining the objection, for striking the first paragraph of exhibit 226, is unknown. The record does reflect the second objected-to section was stricken based on a relevance objection. The inference from the record is that ARCO asked for or acquiesced in the curative admonishment to Ramirez's testimony. This cured any defect. (*Zelayeta* v. *Pacific Greyhound Lines* (1951) 104 Cal.App.2d 716, 731.)

Both pieces of evidence, however, are in effect cumulative of Ramirez's and Tebo's other testimony, the representatives were directed to be cautious about using the sales and profit data when making representations to

dealers about converting their stations. Also, there is substantial evidence in the record ARCO had a push on to convert as many stations as possible and interoffice memoranda showed the representations made to Nielsen were false.

The court fully instructed the jury they were to decide the case solely on the evidence, not to take questions, arguments or statements of counsel as evidence, and not to consider matters stricken. The testimony in both instances was not mentioned again by either counsel, during further testimony or in closing argument. In light of the other evidence in this case, we do not find any prejudice. The statements were not inflammatory in character or calculated to blind the jury to a lack of proof in other evidence. (See *Lafrenz* v. *Stoddard* (1942) 50 Cal.App.2d 1, 9.).

ARCO also asserts certain facts of Nielsen's background were erroneously admitted into evidence, thereby prejudicing the award of punitive damages. Dr. Colarusso analyzed and compared Nielsen's life experiences and how he reacted to stress and periods of crisis during those experiences with the stress and lost profits he experienced in the conversion of his conventional service station business. ARCO objected to this evidence on grounds of relevance. While the court did originally rule such was relevant for the issue of emotional distress damages, which we have now determined not to be appropriate under section 3343, such is also relevant to punitive damages.

ARCO's defense suggested Nielsen had a background in the sales of groceries and therefore he should have known the projections were not true and that he mismanaged his store and station, he was not present at the unit enough of the time and was overstaffed to his economic

detriment. Dr. Colarusso's testimony suggested Nielsen could properly manage stressful situations and had a varied background, not just in grocery and gasoline. The reference in his testimony to Nielsen's military background, with Nielsen receiving a medal of honor for combat, was briefly mentioned and the jury was instructed to disregard that mention to military decorations immediately after ARCO objected. Mention of his wife's illness was very brief and was allowed in rebuttal over ARCO's relevance objection. Such was properly held to be relevant and admissible to show why Mrs. Nielsen couldn't help with the business like ARCO had shown other owners' wives and families did in helping to run a financially successful operation. Mention of these background facts were brief and narrowly examined. Under the circumstances, there is no prejudice shown.

(2) The Relationship Between Compensatory Damages and Punitive Damages

(3) Excessiveness of Punitive Damages

ARCO also contends the exemplary damages are excessive and not related to compensatory damages. The jury awarded $475,788 in compensatory damages[18] and $3.5 million in punitive damages. ARCO argues the punitives are disproportionate to the compensatory damages.

> "There is no fixed ratio to determine the proper proportion between punitive and compensatory damages. [Citations.] The calculation of punitive damages involves, instead, 'a fluid process of adding or subtracting depending on the nature of the acts and the effects on the parties and the worth of the

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[18] We subtract the $50,000 for emotional distress damages improperly awarded Nielsen.

> defendants,' and in this regard juries have a wide discretion in determining what is proper." (*Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1097, quoting *Walker* v. *Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 998.)

The purpose of exemplary damages is to punish wrongdoers and thereby deter the commission of wrongful acts. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928, fn. 13.) Wealth of the wrongdoer is an important factor in determining the excessiveness of an exemplary damages award; the wealthier the wrongdoer, the larger the award may be. (*Bertero* v. *National General Corp., supra,* 13 Cal.3d 43 at p. 65.) A defendant's net worth is considered the best measure of his wealth for purposes of punishing the wrongdoer and assessing exemplary damages. (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391.) In the final determination, an award of punitives will be reversed as excessive only when the entire record viewed most favorably to the judgment reveals the award was the result of passion and prejudice. (*Walker* v. *Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 997.)

Here, the evidence established ARCO's net assets in mid-1985 were $6,691,000,000 and its estimated average annual income after all expenses and taxes for three and one-half years before trial was $986 million. Although no formula exists for "making a mathematical breakthrough" to fix an amount of punitive damages (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d 381 at p. 388), under any traditional formula the amount awarded is reasonable. As the trial court stated when it denied ARCO's motions for new trial and judgment n.o.v.: "I think the jury could have arrived reasonably at a larger number [for punitive damages] than they did." We can-

not conclude as a matter of law, this award, scrutinized by an experienced trial judge, is excessive.

DISPOSITION

The damages awarded for emotional distress are stricken; in all other respects, the judgment is affirmed. Parties to bear their own costs on appeal.

BUTLER, J.

WE CONCUR:

KREMER, P.J.

WORK, J.

APPENDIX B

APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN V. NIELSEN,
Plaintiff and Respondent,

v.

ATLANTIC RICHFIELD COMPANY,
Defendant and Appellant.

ORDER MODIFYING OPINION AND DENYING REHEARING

D003945

(Super. Ct. No. 473779)

THE COURT:

The opinion filed on July 6, 1987, is modified as follows:

1. On page 47, footnote 18 is added after the first sentence of the second full paragraph, ending with the word "damages," stating:

[18]As noted earlier, Roberson's testimony was minimal and not prejudicial.

This footnote will require renumbering of all subsequent footnotes.

2. On page 51, the captions (2) and (3) are deleted and replaced with:

(2) The Relationship Between Compensatory Damages and Punitive Damages, and the Excessiveness of Punitive Damages

3. On page 52, the following text is added after the *Devlin* citation and before the last sentence:

However, additional factors provide guidance in determining whether the purpose and function of punitive damages is served in any particular case. On factor is the degree of reprehensibility of a defendant; the more reprehensible the act, the greater the appropriate punishment. (*Bertero* v. *National General Corp., supra,* 13 Cal.3d 43 at p. 65.) Another factor is the reasonable proportion of punitives to the actual harm suffered. (*Neal* v. *Farmers Ins. Exchange, supra,* 21 Cal.3d 910, 928.) The purpose and 'function of deterrence [, though,] will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." (*Rosener* v. *Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 751.)

The petition for rehearing is denied.

____

Presiding Justice

APPENDIX C

APPENDIX C

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 1, No. D003945

S002057

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

NIELSEN, *Respondent,*

v.

ATLANTIC RICHFIELD COMPANY, *Appellant.*

Appellant's petition for review DENIED.

PANELLI
Acting Chief Justice

APPENDIX D

APPENDIX D

COURT OF APPEAL — STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

Office of the County Clerk
San Diego County
220 W. Broadway Street
San Diego, CA 92101

RE: NIELSEN, JOHN V.
v.
ATLANTIC RICHFIELD COMPANY
D003945
San Diego County No. 473779

* * REMITTITUR * *

I, Keenan G. Casady, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on July 6, 1987, and that this opinion or decision has now become final.

____ Appellant ____ Respondent to recover costs.
_✓_ Each party to bear own costs.
____ Costs are not awarded in this proceeding.

Witness my hand and the seal of the court affixed this Oct 21 1987

KEENAN G. CASADY, Clerk

By: W. Pasel
Deputy Clerk

APPENDIX E

APPENDIX E

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

JOHN V. NIELSEN
Plaintiff
vs.
ATLANTIC RICHFIELD CO.
Defendant

Judgment on Verdict in Open Court
C.C.P. Sec. 664
No. 473779

This action came on regularly for trial on the 7th day of August, 1985. The said parties appeared by their attorneys, George Berger and Kenneth Turek, counsel for Plaintiff and Stephen Maseda and John Fitzgibbons, counsel for Defendant. A jury of twelve persons was regularly empaneled and sworn to try said action. Witnesses on the part of Plaintiff and Defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider its verdict; subsequently, all the jurors returned into court with the verdict signed by the foreman, and duly rendered their verdict in writing in favor of the Plaintiff, as follows:

"We, the jury in the above-entitled action, find in favor of plaintiff. We further find damages as follows:

Compensatory	$ 525,788.00
Punitive	$3,500,000.00

Dated: September 24, 1985

S/Avalee Nicholls
FOREMAN

Further, that special findings made at the request of counsel are attached hereto, and incorporated by reference.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said Plaintiff, JOHN V. NIELSEN have and recover from said Defendant, ATLANTIC RICHFIELD CO. costs and disbursements incurred in this action, amounting to the sum of $

I, the undersigned, Clerk of the Superior Court of San Diego County, do hereby certify the foregoing to be a full, true and correct Judgment entered in the above entitled action.

ATTEST my hand and the seal of said Superior Court, this 24th day of September, 1985.

ROBERT D. ZUMWALT, Clerk

By Carol L. Bellville

Deputy Clerk

APPENDIX F

APPENDIX F

RULE 28.1 LIST OF PETITIONER'S NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

Acrylates, Inc.
Agro Internacional, S. de R.L. de C.V.
Alyeska Pipeline Service Company
AMCOR-Chem. Inc.
Anamax Mining Company
ARCHEM Company
Arco Centennial Corp.
Arco Chemical Asia Pacific, Ltd.
ARCO Chemical Bahamas Ltd.
ARCO Chemical Canada Inc.
ARCO Chemical China, Limited
Arco Chemical Company
ARCO Chemical (Deutschland) GmbH
ARCO Chemical Espana Co.
Arco Chemical Europe, Inc.
Arco Chemical (Europe) Inc.
Arco Chemical Export Sales Company
Arco Chemical Foreign Sales Corporation
ARCO Chemical Iberica de Portugal, LBA
ARCO Chemical Iberica, S.A.
ARCO Chemical Indonesia, Inc.
Arco Chemical International Company
ARCO Chemical Japan, Inc.
ARCO Chemical Korea, Inc.
ARCO Chemical Middle East, Inc.
ARCO Chemical New Zealand, Inc.
ARCO Chemical Overseas Services, Inc.
ARCO Chemical Pan America, Inc.
ARCO Chemical Products Europe, Inc.

ARCO Chemical (Singapore) PTE, Ltd.
ARCO Chemical (Thailand), Limited
ARCO Chemical Trading, Inc.
ARCO Chemie Nederland, Ltd.
ARCO Chimie France Corporation
ARCO Chimie France S.N.C.
ARCO Comfort Products Company
ARCO Durethene Pipe, Inc.
ARCO Durethene Plastics, Inc.
ARCO Energy Conservation, Inc.
ARCO Environmental, Inc.
ARCO France, Inc.
ARCO Idemitsu Corporation
ARCO/JSP Company
ARCO Medical Products Company
ARCO Plastics, Inc.
ARCO Solar (Europe) GmbH
ARCO Solar (Europe) S.p.A.
ARCO Solar Group, Inc.
ARCO Solar Nigeria, Ltd.
ARCO Synthesis, Inc.
ARCO Technology, Inc.
Arpet Petroleum Limited
Atlantic Richfield Hanford Company
Atlantic Richfield Oil Limited

Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited

Candel International, Limited
C L Petroleum Inc.
Colonial Pipeline Company
Compania Minera Dos Republicas S.A. de C.V.
Compania de Petroleo Ganso Azul. Ltda.
Cook Inlet Pipe Line Company

Curragh Coal Sales Co. Pty. Ltd.
Dixie Pipeline Company

East Texas Salt Water Disposal Co.
85819 Canada Limited
Eisenhower Mining Company
Enerlink
Enerlink (Scotland) Limited

Graph, Inc.
Greater Pacific Limited

HWG Inc.

Industrias Nacobre, S.A. de C.V.
Iricon Agency Ltd.

Kenai Pipe Line Company
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company

Las Quintas Serenas Water Company
Logan Aluminum, Inc.

Nihon Oxirane Company, Ltd.
Nordisk Mineselskab A/S
Northrop Incorporated
N.T. Development Inc.

Oxirane Chemical Company
Oxirane Technology (Japan) Company

P.T. Elnusa Chemlink
Platte Pipe Line Company

Prince Consolidated Mining Company

Richfield U. K. Petroleum, Limited
Rodman, Inc.

SHOWA ARCO Solar Far East PTG. LTD.
SHOWA ARCO Solar K.K.
Sinclair (U.K.) Oil Company Limited
Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
SUMIARCO Company Limited

Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

Union de Credito Industrial Vallejo, S.A.

PROOF OF SERVICE BY MAIL

I am, and was at all times herein mentioned, a citizen of the United States, a resident of the County of Los Angeles, over the age of 18 years and not a party to this action or proceeding. My business address is 1706 Maple Avenue, Los Angeles, California 90015.

On January 12, 1988, I served the foregoing petition for Writ of Certiorari in re: "Atlantic Richfield Company -v- John V. Nielsen" in the United States Supreme Court, October Term 1987, No. . . . . .

On the parties in said action by placing three copies thereof enclosed in a sealed envelop with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

George J. Berger, Esq.
Jennings, Engstrand & Henrikson
2255 Camino Del Rio South
San Diego, CA 92108

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this January 12, 1988, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA

(2)

No. 87-1196

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
JOHN V. NIELSEN,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

BRIEF IN OPPOSITION

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No. 87-1196

In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,
v.
JOHN V. NIELSEN,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District

---

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case arises out of petitioner Atlantic Richfield Company's ("ARCO") crash program to salvage its retail gasoline division by converting retail stations into new units combining self-service, low-priced gasoline with high-priced convenience grocery stores. This program involved a dealer rent and gasoline sales structure that guaranteed ARCO's profits even though many independent dealers could not and did not survive under the new program. Acquiescence of independent dealers in the new program was crucial to ARCO. Therefore, to induce its independent dealers to abandon profitable going concerns and invest in the new program, ARCO withheld data it developed in-house regarding both actual and projected dealer profits, but supplied station operators with false

profit data and misleading descriptions of its analyses and expertise.

Respondent John V. Nielsen, a successful independent ARCO dealer, was fraudulently misled and pressured into participating in the new program. In 1981, Nielsen sued ARCO in the California courts. Trial commenced on August 7, 1985 (RT 4).[1] On September 24, 1985, the jury found ARCO engaged in fraud and deceit and rendered a verdict in favor of Nielsen in an amount of $525,788 for compensatory damages and $3,500,000 for punitive damages. ARCO unsuccessfully challenged the verdict in motions for a new trial and for judgment notwithstanding the verdict. In an unpublished opinion ("Op."), the California Court of Appeal unanimously affirmed the verdict, except for striking $50,000 awarded for emotional distress. ARCO petitioned the Court of Appeal for rehearing. This petition was denied in an order modifying the opinion ("M. Op."). ARCO then petitioned the California Supreme Court for review, which was denied on October 14, 1987.

In a petition for certiorari to this Court, ARCO challenges the punitive damages award on the grounds that the size of the award violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Neither these nor any other federal constitutional challenges to the punitive damages award were raised in or decided by the California courts. Petitioner *never* mentioned the Due Process Clause of the Fourteenth Amendment in any pleading or argument to the California courts. Nor did petitioner ever argue to any California court that the punitive damages award should

[1] "RT" or page and line references such as "111:00" refer to the reporter's transcript. "CT" refers to the clerk's transcript.

be overturned as inconsistent with the Excessive Fines Clause. Petitioner is thus precluded from raising these federal questions for the first time in this Court.

A. Substantive Facts

Petitioner ARCO has misrepresented or omitted many material facts in its statement of the case. Accordingly, a concise counterstatement is necessary to make clear that there is ample evidence in the record to support the verdict as well as the successive post-trial decisions by the California courts.

ARCO's vice president of retail marketing testified that in 1974 its retail gasoline operation lost $45,000,000 "and there was a real serious question" whether ARCO would "stay in the retail service station business." 1764:25-1765:2. He explained the mini-market program "was the first major project" for ARCO to get back on track and "make a lot of money for the company." Had the program failed, it "almost was tantamount to the failure of the marketing department, the retail marketing department." 1765:6-17.

Under the mini-market program, ARCO's profit increased spectacularly and was virtually risk-free because: (1) ARCO gasoline sales increased as much as 300% due to low dealer profit margins coupled with self-serve equipment (759:16-20);[2] (2) ARCO charged dealers a high

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[2]Every gallon sold is ARCO gas. Thus, high volume gasoline sales benefit ARCO regardless of whether the operator survives. In the words of ARCO's first San Diego mini-market dealer representative, "[O]ur primary function was to have throughput . . . ." 254:11-12. ARCO's former national mini-market ("AM/PM") franchise manager testified "the primary responsibility" of an ARCO dealer representative was "to make sure . . . we are trying to sell all the gasoline that is available." 1641:9-13; 1642:12-17.

minimum rent on the grocery store plus a percentage of all grocery sales above the minimum (254:18-24; Ex. 1049), plus "rent" for ARCO's gas the dealer sold (765:20-22); (3) ARCO was the only major company offering gas and convenience food at all conversions (1762:26-1763:2); (4) ARCO had virtually no risk of operating the unit, passing all risks to the independent dealer/operator, and if a dealer could not survive ARCO's wholly-owned subsidiary was designed to take over.

Thus, in 1977, ARCO decided to convert 500 units in three years. 1756:2-24; 1775:4-8. Its $5.5 million conversion budget for 1978 increased to $8.8 million for 1979 (568:5-16). In February 1978, ARCO's top management admonished that units were not being converted quickly enough, particularly in the West. Ex. 133. A year and a half later, months after serious questions had been repeatedly voiced within ARCO about the soundess of the program and the dealers' ability to survive (Exs. 149, 182, 308), ARCO had weekly checks to assure the budgeted dollars were still being spent and targeted conversions completed. Ex. 177. Promotions of ARCO people depended on success in convincing dealers to convert. 255:4-21.

A major impediment to ARCO's conversion schedule was that most, if not all, of its independent dealers were on leases that had to be regularly renewed under applicable law, barring exceptional circumstances. RT 263:1-264:4. Therefore, ARCO could not simply terminate dealers not willing to convert. Also, the entire ARCO organization recognized independent dealers were more motivated, harder working and more committed than company employees. 262:20-28; 263:1-264:4, 786:27-787:4. ARCO's analysts established minimum sales volume projections ("VP's") and other information to assure ARCO

recovered its investments with an acceptable profit margin, but the independent dealers were not given the survey information which ARCO developed for itself (425:1-7). Instead, ARCO's disclosure policy to dealers was to always give a "positive answer," and to present positive data in order to win the dealer over (247:17-21; 254:28-255:10).

To prevent having to close and sell units after a dealer was exhausted and broke, ARCO moved in its wholly-owned subsidiary, Prestige Stations, Inc. ("PSI"). One of PSI's principal functions was to quickly take over any unit given up by an independent dealer. 1396:20-1397:1. Even though ARCO strongly preferred independent operators, by December of 1982, PSI had to operate over half (15 of 29) of ARCO's mini-markets in San Diego County; coincidentally, Nielsen's unit was the first (1396:7-19; 2158:24-27).

Nielsen had become a Richfield dealer in 1967. In the next eleven years, he had a profitable business and an outstanding reputation, receiving uniformly good to outstanding reports from ARCO supervisors. Exs. 105, 86, 95; RT 1698:7-15; 1732:5-19; 267:3-6. He had the same mechanic for eleven years, a loyal crew of attendants and 470 steady customers. 828:26-27; 830:19-25. He had ample free time and opportunities to travel. 624:19-26; 829:13-21; 830:26-832:2. "He was a very successful, very healthy man." 978:8.

He had no desire to give up his business and life-style until numerous ARCO meetings, presentations, entreaties, a slick brochure and ostensibly hard data won him over. In this process, and consistent with its larger scheme, ARCO:

1. Failed to disclose either its first or second analysis both of which showed conversion of Nielsen's unit would be a disaster for him;

2. Fabricated a third analysis to justify conversion, the results of which it *did* give Nielsen;

3. Decided before conversion that it would increase Nielsen's minimum rent after conversion, and that it would delete essential pumping capacity, but did not inform him until Nielsen had agreed to convert, his original station had been torn up, and it was economically impossible for him to turn back;

4. Failed to disclose that ARCO regarded the conversion program as experimental, particularly for Nielsen's station; and

5. Failed to disclose existing mini-market conversions were actually doing far worse than indicated by the profit figures ARCO gave Nielsen.

At about the time of ARCO's second analysis, Nielsen had several meetings with ARCO representative, Mr. Abbott, and was "encouraged" by "the company" to think about converting. Even though Abbott had the discouraging results of ARCO's second analysis, Abbott told Nielsen ARCO had performed surveys on his site and thought it would be a very successful unit. 834:23-836:6. Nielsen repeatedly asked for the specifics contained in the surveys, but Abbott never gave any answers. 836:7-21. Nielsen was asked to come to a restaurant meeting where at least five and possibly six ARCO representatives "explained" the program to him alone. 1725:3-18; 1733:5-10. Still, he was undecided ("borderline"). 837:25-27.

ARCO's principal factual contention at trial and on appeal was that it used accurate demographic information in its third analysis, the results of which were given to

Nielsen at yet another meeting, in September 1978 (Ex. 300). In fact, ARCO's manager of the Anaheim Region and the manager responsible for deciding which units to convert (C.T. Fulkerson) instructed the sales forecaster (W. Ottman) to revise his earlier calculations using incorrect and unsupportable demographic data. Fulkerson instructed Ottman to assume a 200% population increase from the earlier calculation (Ex. 1087K) even though the actual population increase was 18-26% (1053:3-1054:13; 462:2-21; Ex. 15). Fulkerson told Ottman to assume a housing density increase of some 600% (Ex. 1087K), even though the actual housing density increase was 50% (1054:14-27). As the Court of Appeal Opinion noted, ARCO's appellate counsel was forced to concede there was an exhibit showing the "housing unit density factor was not accurate and Ottman ignored the data in his own files on the direction of Fulkerson." Op., App. 17a:5-9.

After the September 1978 meeting, ARCO reassessed its own profitability and expenditures in light of federal gas allocation restrictions. First, it deleted a $20,000 projected expenditure for lengthened pump islands and new pumps at Nielsen's unit. Nielsen was not told about this until the end of May 1979, when his unit was already torn up and his old business abandoned. 858:22-859:27.

To further protect its own profits, ARCO raised Nielsen's minimum store rent from $2,000 (Ex. 300) to $3,000/month, and also charged rent for self-serve equipment. On May 8, 1979, after Nielsen had signed all the new agreements but before ARCO started construction, Fulkerson signed off on ARCO's fourth analysis incorporating — in-house — these rent increases. Ex. 9B. Nielsen did not know about the amount of the rent increase

until December 1979, five months after he opened the converted station (870:12-28).

Despite ARCO's professed experience and competence (Ex. 301) asserted to Nielsen and other dealers, ARCO was, in mid-1978 to 1979, still very much in an experimental mode. 2140:27-2141:10. On May 2, 1979, an ARCO internal memo said of units (like Nielsen's) whose projected food sales were less than $250,000, they "will be considered experimental." Ex. 2024 at 3. No one ever hinted to Nielsen his conversion was actually "considered experimental" by the company.

During the time Nielsen's unit was being converted, ARCO's own top management acknowledged in writing that ARCO lacked sophisticated knowledge, that the program was still early and that its volume projections were faulty. J.J. Conway (Manager of Sales and Sales Development) wrote top management that units should be converted "back" if the dealer could not survive. But ARCO vetoed the idea. Ex. 149.

Nor did ARCO disclose to "prospects" like Nielsen, the *actual* profitability of units that had already been converted. Under an ARCO internal memo (written months before Nielsen was convinced to convert), the dealer profitability of all 89 existing mini-markets was summarized. Ex. 305. Only seven of the 89 units averaged a dealer profit of $3,600/month or more, the figure ARCO gave Nielsen. Thirty-six were averaging less than $500 per month operator profit; many were losing money for the dealer. Because Nielsen's unit was small, had "minimal" foot traffic (Ex. 16), was in an "upper middle income" area (Ex. 15), had many elderly surrounding it, was not near a freeway off-ramp (*see* 1702:24-28) or industrial area (*see* 1702:11-17), it was ludicrous to project that it would on average out-perform all but seven of the 89

existing units.[3] But no data such as Exhibit 305 were ever disclosed to Nielsen.

Except for sales of gasoline, Nielsen closed his conventional unit in May 1979, and reopened as a mini-market August 4, 1979.

During the twenty months he operated the mini-market, grocery sales never approached the levels ARCO had given him. Meanwhile, the rent charged by ARCO mounted steadily until it became intolerable. By August 1980, less than a year after opening, the total rents charged by ARCO for the store, gas, self-service equipment, etc., were over $4,000/month, or over $2,000 more per month than ARCO had told Nielsen would be charged for much higher sales. *See* Exs. 1005, 2044A.

After all his funds were gone, Nielsen asked ARCO for advice. ARCO advised selling out and a prospective purchaser made an offer (RT 892-895), but ARCO decided the buyer was unqualified. Nielsen was at the end of his tether and turned the keys over to ARCO's subsidiary PSI, on April 1, 1981.[4]

---

[3]ARCO knew these factors are critically important to the success or failure of a mini-market. ARCO had comprehensively studied and reported these factors in-house, but never explained them to dealers. *See, e.g.*, Ex. 302.

[4]ARCO asserts that in the view of the trial court, the verdict "could have gone the other way." Pet. 8:8-9. ARCO has left out the trial court's other remarks: "Your verdict, in my opinion, is entirely consistent with the evidence you heard . . . . I see nothing inconsistent with the evidence you heard in this case, in this courtroom." RT 2531:18-22.

At the hearing on ARCO's post-trial motions, the trial court said, "[T]he case was fairly and accurately tried, and the damages found by the jury were well within the range of evidence and range of reasonableness, . . . I think the jury could have arrived reasonably at

B. The Procedural Facts

At no time in the six years of proceedings before the California courts did petitioner raise a federal constitutional challenge to the claim or award of punitive damages. Before trial, ARCO raised ten separate affirmative defenses, but made no mention of a federal constitutional defense to punitive damages (CT 259-261). ARCO filed seven briefs respecting various *in limine* matters at trial (CT 426-465), none of which mentioned constitutional objections to punitive damages. ARCO challenged the compensatory damages jury instructions on a number of grounds (RT 2397), but made no constitutional objection to the standard "BAJI" California punitive damages instructions (RT 2394). Nor did ARCO raise constitutional issues in post-trial motions.

On November 3, 1986, ARCO filed its opening brief to the California Court of Appeal. Neither this brief nor ARCO's reply brief (filed on March 2, 1987) mentioned any possible constitutional restrictions on the punitive damages award. In April 1987, prior to oral argument, both ARCO and Nielsen wrote letter briefs to the Court of Appeal regarding the then recent *Downey* decision of the California Court of Appeal.[5] This case held that neither the Excessive Fines Clause of the Eighth Amendment nor the Due Process Clause's criminal safeguards are applicable in civil suits for punitive damages. 189 Cal.App.3d at 1100-01. Despite explicit discussion of those constitutional issues in *Downey*, ARCO continued to refrain from raising any such issue in the present case. In fact, ARCO

---

a larger number [for punitive damages] than they did." RT Post Trial Hearing 22:6-28.

[5]*Downey Sav. & Loan Ass'n. v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), no. 87-159 on Petition to this Court.

argued that the *Downey* analysis of punitive damages supported its position for reversal. ARCO Letter Brief, April 13, 1987. And in neither oral argument before the Court of Appeal nor on petition for rehearing to that court did ARCO raise any constitutional challenges to the punitive damages award.

On August 17, 1987, ARCO filed a petition for review in the California Supreme Court. Review by that court is discretionary. ARCO's petition ("Cal. Pet.") argued at length against the punitive damages award, but the argument was carefully and deliberately limited to an adoption of California's traditional three factors that " 'afford guidance' for the review of punitive damages: (1) the reprehensibility of the . . . conduct; (2) the actual injury suffered; and (3) the wealth of the defendant." Cal. Pet. 12:14-17 (citation omitted). ARCO did not challenge the constitutionality of this analysis; it endorsed the analysis and argued that the lower courts had misapplied traditional California law.

In a footnote to the petition to the California Supreme Court in the midst of its argument relying on current California law, ARCO made one oblique reference to the Excessive Fines Clause of the Eighth Amendment.[6] But this footnote *did not* urge reversal of the punitive damages award on Eighth Amendment grounds. This footnote

---

[6]ARCO's footnote mention of the constitutional issue came immediately after the following words:

> [A]ll three of the factors are "grounded in the purpose and function of punitive damages" and therefore should be considered. 21 Cal.3d at 928.
>
> Consideration of these factors is necessary to ensure that the punitive damage award is not excessive.

Cal. Pet. 13:5-10.

merely suggested that if the United States Supreme Court should establish Eighth Amendment limits on punitive damages in the pending case of *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765, then ARCO "would also argue to" the California Supreme Court that the award violated the Excessive Fines Clause. The Due Process Clause was never mentioned.

Throughout this litigation, ARCO had ample opportunity to raise federal constitutional challenges to the punitive damages award and was on notice of the existence of the claims it now seeks to assert for the first time. Probably the leading modern California case involving constitutional challenges to California's punitive damages law, *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 716-17, 719, 60 Cal. Rptr. 398, 417-18 (1967), rejected the application of criminal procedures and quantitative standards to civil punitive damage determinations. The last California challenge to punitive damages on constitutional grounds decided during the pendency of this case is *Downey*. Between *Toole* and *Downey*, numerous other litigants challenged the constitutionality of California's punitive damages law.[7]

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[7]*See, e.g., Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404-05, 89 Cal. Rptr. 78 (1970) (challenge on vagueness of punitive damages being allowed for "oppression, fraud, or malice"). *Wetherbee v. United Ins. Co. of Am.*, 18 Cal. App. 3d 266, 272, 95 Cal. Rptr. 678 (1971) (punitive damages challenged as imposition of a fine without benefit of constitutional rights afforded criminals). *Gibson v. Gibson*, 15 Cal. App. 3d 943, 949, 93 Cal. Rptr. 617 (1971) (*same* as to right to competent counsel). *Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 66 n. 13, 118 Cal. Rptr. 184 (1974) (challenge on lack of standards). *People v. Superior Court*, 12 Cal. 3d 421, 432-33, 115 Cal. Rptr. 812 (1974) (challenge that punitive damages case must allow invocation of privilege against self-incrimination). *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-02, 136 Cal. Rptr. 132 (1976)

Similarly, California federal cases have spotlighted the constitutional questions. *In re Related Asbestos Cases*, 543 F.Supp. 1152, 1157 (N.D. Cal. 1982) (court rejected various constitutional challenges at the pre-trial stage as "inappropriate . . . at the present time . . . .").

Finally, this Court on April 22, 1986, squarely invited resolution of constitutional limits on punitive damages stating, "These arguments raise important issues which, in an appropriate setting, must be resolved; . . . " *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, ____, 89 L. Ed. 2d 823, 837 (1986). This Court's decision in *Lavoie* was rendered several months *before* ARCO filed its opening brief to the Court of Appeal. Despite this widespread judicial discussion of the constitutionality of punitive damages — and ARCO's awareness of the discussion — ARCO never saw fit to raise the constitutional issues in the California courts.

(challenge for lack of standards as to amount of punitive damages and that punitive damages were "cruel and/or unusual" punishment). *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 819-20, 157 Cal. Rptr. 482 (1979) (challenge to Cal. Civ. Code § 3294 as unconstitutional). *Hannon Eng'g, Inc. v. Reim*, 126 Cal. App. 3d 415, 430-31, 179 Cal. Rptr. 78 (1981) (challenge to lack of standards for punitive damages). *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 811, 174 Cal. Rptr. 348 (1981) (challenge to punitive damages on ex post facto, double jeopardy and "fair warning" grounds). *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n. 2, 185 Cal. Rptr. 654 (1982) (challenge to punitive damages statute as unconstitutional on "a number of theories"). *Peterson v. Superior Court*, 31 Cal. 3d 147, 160-61, 181 Cal. Rptr. 784 (1982) (challenging punitive damages on due process and ex post facto grounds).

ARGUMENT

I

BECAUSE ARCO DID NOT PROPERLY RAISE ANY FEDERAL QUESTION IN THE STATE COURTS, ITS PETITION MUST BE DENIED

It is essential to the jurisdiction of this Court that a substantial federal question was properly raised in state court proceedings. Rule 21.1h requires the petition to "specify the stage in the proceedings, both in the . . . first instance and in the appellate court, at which the federal questions . . . were raised; . . ." ARCO did not raise or even mention its due process challenge at any stage. It has belatedly and conditionally mentioned the Excessive Fines Clause of the Eighth Amendment, but it never asked the California courts to rule that the punitive damages award violated the Eighth Amendment. Hence, this Court lacks jurisdiction. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182-83 n. 3 (1983) and cases cited therein.[8]

Indeed, ARCO concedes it did not "assert an Eighth Amendment (or Due Process) right to be free of excessive civil punitive damages, . . ." in the California courts. Pet. 10:4-6. This concession alone requires ARCO's petition be denied. ARCO nonetheless, appears to assert two justifications for failing to raise these issues. Its primary justification is that "then-existing law did not recognize any such right" and hence it could not have waived the right to raise the point. Pet. 10:5-7; 10:28-11:3.

If ARCO's argument were to be followed, the rule requiring federal issues first be properly raised in the state courts would be meaningless in every case unless

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[8] *See* Stern, Gressman & Shapiro, *Supreme Court Practice*, 144 (6th ed. 1986).

and until some court had squarely held the specific federal right in question to exist or some statute had so decreed. If accepted, ARCO's argument would eliminate, for most cases, the deeply rooted and sensible rule that state courts must be given a meaningful opportunity to deal with federal challenges to their law as applied to a particular case before this Court may be asked to review that case. Hence, it is not surprising that ARCO does not cite, and we have not found, any decision which holds that, as a predicate to review by this Court, the federal issue need be raised in the state courts only when the federal right has been previously established.

On the contrary, this Court has recently held in a closely analogous context the perceived novelty or futility of a claim does not excuse the failure to raise it, particularly where other counsel have raised it and the issue has, as with the issues here, been fermenting in California and other courts for years. Where "various forms of the [constitutional] claim . . . had been percolating in the lower courts for years . . . it is simply not open to argue that the legal basis of the claim . . . was unavailable . . . ." *Smith v. Murray*, 477 U.S. ____, 91 L. Ed. 2d 434, 446 (1986).

> If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts . . . because he thinks they will be unsympathetic . . . .
>
> . . .
>
> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the

> objection as cause for a procedural default. [fn. omitted]

Engle v. Isaac, 456 U.S. 107, 130-134 (1982).

ARCO cites only one totally inapposite case in support of its non-waiver argument. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). *Butts* did not deal with the long-standing jurisdictional requirement that substantial federal questions must be properly raised in the state court as a predicate to jurisdiction in this Court. Rather, *Butts* started in the United States District Court for the Northern District of Georgia. The plurality quote cited by ARCO dealt with whether it was reasonable for the publishing company to not raise an affirmative defense at the pretrial stage in anticipation of developing but unsettled federal law. *Butts* had nothing to do with the jurisdictional requirement, or the policies of comity and federalism that are central to this Court's review of state court cases.

A second justification asserted by ARCO for not raising constitutional issues is that the California courts should have anticipated and used constitutional factors "nonetheless." ARCO's precise statement is:

> While framed under state law, petitioner's arguments nonetheless should have caused the courts to examine some or all of the factors that this Court will likely hold are relevant to the inquiry under either the Eighth Amendment or the Due Process Clause, ...

Pet. 9:17-23.

ARCO is at once arguing out of both sides of its mouth. First, it asserts it could not have known of its potential constitutional protections, but then says the California courts should have used "some or all of the factors" that

are "relevant" to the constitutional "inquiry." This admission totally destroys ARCO's non-waiver argument. If the courts should have *sua sponte* "examined" the factors "relevant" to the constitutional "inquiry" without the issue ever being raised, ARCO cannot credibly claim it is excused from raising and arguing the issues in the first place.

Recognizing that it had not raised any constitutional issue either in the trial court or in the Court of Appeal, ARCO asserts it nevertheless "called the California courts' [*sic* court's] attention to the Constitutional issue when it appeared that this Court could announce a new right." Pet. 11:18-20. This statement is incorrect. As noted, this Court invited scrutiny of constitutional issues in *Lavoie* (April 1986), and numerous recent published California cases had previously framed the issues.[9]

If ARCO and its counsel[10] genuinely intended to properly apprise the California courts of the constitutional issues, they would have squarely challenged (instead of adopting) traditional California punitive damages law. Furthermore, ARCO should have first presented to the California courts the request it now seeks from this Court, namely the request that the Court of Appeal hold its decision pending this Court's decision in *Bankers Life*. ARCO did none of this. Under these circumstances, ARCO has waived not only the right to assert the consti-

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[9]In its opening paragraph under "REASONS FOR GRANTING THE WRIT," ARCO asserts the Eighth Amendment and Due Process Clause issues "are substantial and recurring." Pet. 13:14-15. There is no doubt they are recurring; that is the very reason ARCO should have properly raised them in the state courts if it intended to assert them now.

[10]ARCO had seven counsel on its appellate briefs to the California courts, from three firms and in-house.

tutional issues but also has waived the right to request an order that the Court of Appeal vacate and reconsider its decision pending the decision in *Bankers Life*. ARCO's decision to wait until now to assert constitutional issues may result "from . . . ignorance," a tactical decision or a deliberate choice, "to withhold a claim in order to 'sandbag' . . . ." *Engle v. Isaac*, 456 U.S. 107, 129 n. 34 (1982). In any event, ARCO should not be relieved from the consequences of its actions.[11]

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[11]ARCO cites *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154 (1945), in support of its claim that this Court should vacate the Court of Appeal decision in this case until after *Bankers Life* is decided. *Duel*, however, provides no support for the action petitioner urges. To the contrary, *Duel* held that "since the [state] Supreme Court did not pass on the [federal] question, *we may not do so*." 324 U.S. at 160 (emphasis added). The language petitioner quotes in support of its suggested disposition is plain dictum. In any event, even petitioner's quotation from *Duel* fails to support petitioner for two reasons.

First, in every case cited in the relevant portion of *Duel*, this Court had already properly exercised jurisdiction to hear other federal questions in the case, and the question was whether the Court should go on to resolve the issues properly before it or to defer resolution. In these cases, a supervening change in the law since the time of the judgment under review would have obviated the need for the Court to reach the federal questions properly before it. Thus, in order to avoid unnecessary adjudication of federal questions, in each of these cases this Court vacated the opinion below and remanded the case for reconsideration in light of the supervening law. No such rationale supports petitioner in the present case.

Second, *Duel*'s dictum suggested no more than that a remand *might* be appropriate "in the interests of justice," if a party had been genuinely surprised by unforeseen "new quesions" in the law which had just "emerged." 324 U.S. at 161. As we have demonstrated, ARCO can claim no such surprise in the present case because the "questions" ARCO now seeks to raise have been the subject of extensive discussion in the opinions of this Court and others for

Any suggestion that footnote 6 in ARCO's petition to the California Supreme Court adequately raised the Eighth Amendment issue is squarely disposed of by this Court's recent decision in *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. ____, 95 L. Ed. 2d 474, 487 n. 9 (1987). There appellants had asserted in their brief to the California Court of Appeal that California's Unruh Act might be unconstitutionally vague. But there, as here, the assertion occurred "in the course of an argument that the Unruh Act should be applied only to [certain organizations]." *Id.* This Court held, "This casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction . . . ." *Id.* Similarly, ARCO's casual reference to the Excessive Fines Clause "in the midst of an unrelated argument" *in favor* of applying California's traditional punitive damages analysis is insufficient.[12]

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years. ARCO had ample opportunity — and sufficient information — to raise these issues in the California courts.

[12]In any event, the California Supreme Court's failure to pass on the federal questions forecloses any further reveiw. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). *See also Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983); *Fuller v. Oregon*, 417 U.S. 40, 50 n. 11 (1974). ARCO does not dispute that under applicable California procedural requirements, " '[a] claimed violation of a constitutional right must be raised in the trial court to preserve the issue for appeal'." Pet. 12:8-10. *Selleck v. Globe Int'l, Inc.*, 166 Cal. App. 3d 1123, 1133 n. 5, 212 Cal. Rptr. 838 (1985). Thus, ARCO's failure to present the constitutional questions in conformance with *state* procedure is an adequate and independent ground barring review in this Court. *Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978) and cases cited therein.

At bottom, ARCO seeks to coattail on any potentially favorable ruling in *Bankers Life* and *Downey,* but to do so without having complied with the jurisdictional predicate that has been met in *Bankers Life* (in this Court on direct appeal), and in *Downey* (constitutional issues squarely raised in, decided and discussed by one California Court of Appeal).[13] Denial of ARCO's petition would be consistent with this Court's denial of the similar petition in *Judy's Foods, Inc. v. A&B Food Services Corp.,* No. 86-515, *cert. denied* (1986) (constitutionality of punitive damages not raised until after oral argument on appeal to United States Court of Appeals for the Sixth Circuit), and more recently of *Allstate Ins. Co. v. Hawkins,* 733 P.2d 1073 (Ariz. 1987), No. 87-40.

In *Hawkins,* the Arizona Supreme Court ruled that constitutional issues, respecting a $3.5 million punitive damage award, raised and argued in a supplemental brief to the Arizona Supreme Court after oral argument there came too late. This case would be procedurally analogous to *Hawkins* if ARCO had briefed the constitutional issues

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[13] *Downey's* holding is no justification for ARCO's failure to raise the constitutional issues to the Court of Appeal in this case. There are six districts of the California Court of Appeal; they are divided into separate divisions for a total of 18 divisions in the state. *Downey* was decided by the Firt District, this case by the Fourth District. It is not uncommon for different districts to reach opposite conclusions on important, current issues, and decisions of one district are not binding on another. *People v. Stamper,* 195 Cal. App. 3d 1608, 1613, 241 Cal. Rptr. 449 (1987).

Moreover, this Court recognizes that "a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid." *Engle v. Isaac,* 456 U.S. 107, 130 (1982).

to the Court of Appeal[14] after argument by supplemental brief or on its petition for rehearing. But ARCO waited even longer to mention the Excessive Fines Clause and never raised that issue. Therefore, it is precluded from raising that issue now even more than petitioner in *Hawkins,* where at least the Arizona Supreme Court was squarely presented the issues and given an opportunity to decide.

II

EVEN IF ARCO HAD PROPERLY RAISED CONSTITUTIONAL CLAIMS BELOW, IT WOULD BE INAPPROPRIATE TO GRANT CERTIORARI

A. Even In This Court, ARCO Appears To Adopt Current California Law But Complains It Was Not Followed

ARCO commences its substantive argument with the assertion that " '*carte blanche* [is] currently given to, and regularly exercised by juries' " to determine punitive damages and that the "root cause" of the growth in these awards is "abdication by appellate courts of their obligation to reduce excessive punitive damage awards." Pet. 13:25-14:4. Recent published decisions in California show that juries do not have *carte blanche* and California appellate courts have not abdicated anything.[15]

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[14]The California Court of Appeal was the only appellate court reviewing this case as a matter of right. Review by the California Supreme Court is discretionary.

[15]*Ramona Manor Convalescent Hos. v. Care Enter.*, 177 Cal. App. 3d 1120, 225 Cal. Rptr. 120 (1986) (Court of Appeal remanded $2.5 million punitive damage award); *Wayte v. Rollins Int'l, Inc.*, 169 Cal. App. 3d 1, 215 Cal. Rptr. 59 (1985) (affirmed trial court's reduction to $200,000 of one $950,000 punitive damages award, and reduction of

Next, says ARCO, the Court of Appeal relied "exclusively on ARCO's wealth" in reviewing the case and thereby failed "to consider the other controlling factors" under well-settled California law. Pet. 14. This is incorrect. The Court of Appeal expressly noted the factors which "provide guidance in determining whether the purpose and function of punitive damages is served in any particular case." M. Op., App. 44a. These, wrote the Court of Appeal, are, "Wealth of the wrongdoer . . . degree of reprehensibility of . . . the act, . . ." and "the reasonable proportion of punitives to the actual harm suffered." Op., App. 41a; M. Op., App. 44a. It concluded, "[U]nder *any traditional formula* the amount awarded is reasonable." Op., App. 41a (emphasis added).

Later, ARCO argues that under a variety of published California decisions, the arithmetic ratios in this case show the award "certainly is excessive when compared to other such awards in California." Pet. 18:4-19:24. This is incorrect. This case was neither a trend-setter, nor

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two other awards to \$50,000 from \$200,000); *Jahn v. Brickey*, 168 Cal. App. 3d 399, 214 Cal. Rptr. 119 (1985) (affirmed trial court's reduction of \$250,000 to \$100,000 in punitive damages); *Sprague v. Equifax, Inc.*, 166 Cal. App. 3d 1012, 213 Cal. Rptr. 69 (1985) (affirmed trial court's reduction of \$5 million punitive damage award to \$1 million); *Goshgarian v. George*, 161 Cal. App. 3d 1214, 208 Cal. Rptr. 321 (1984) (Court of Appeal reduced \$15,000 punitive damages award to \$7,500); *Burnett v. Nat'l Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983) (trial court reduced \$1.3 million award to \$750,000; Court of Appeal reduced it further to \$150,000); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (trial court reduced \$125 million jury award to \$3.5 million); *Alhino v. Starr*, 112 Cal. App. 3d 158, 169 Cal. Rptr. 136 (1980) (Court of Appeal remanded \$150,000 punitive damage award); *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 168 Cal. Rptr. 237 (1980) (\$10 million punitive damage award reduced to \$2.5 million by Court of Appeal).

unique, nor out-of-line under state law. In arithmetic terms, the punitive damage award is a smaller proportion of ARCO's net worth ($6.7 billion) or annual net income ($986 million) than several published California decisions decided before trial. [16] The punitive/compensatory damage award ratio ($3.5 million/$475,000[17] or about 7.37/1) is also well within recognized limits in California. *See generally Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,* 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984); *Moore v. Am. United Life Ins. Co.,* 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984) (ratio is 83:1).[18]

Even if ARCO's points that juries have *carte blanche,* that appellate courts have abdicated, and that the Court of Appeal did not apply settled California law or reasonable arithmetic ratios were all true, this Court has no

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[16]*Betts v. Allstate Ins. Co.,* 154 Cal. App. 3d 688, 711, 201 Cal. Rptr. 528 (1984) ($3 million punitive damages represented "less than one-half week's earnings of Allstate." One-half week's earnings of ARCO would be over $9 million). *Moore v. Am. United Life Ins. Co.,* 150 Cal. App. 3d 610, 197 Cal. Rptr. 878 (1984) ($2.5 million punitive damages represented 3.2% of defendant's net worth and 6.6% of its annual income. In contrast, the $3.5 million assessed against ARCO was 0.052% of ARCO's net worth and 0.35% of ARCO's annual income). In *Rosener v. Sears, Roebuck & Co.,* 110 Cal. App. 3d 740, 750, 168 Cal. Rptr. 237 (1980) the final $2.5 million punitive damages award was something "less than [0.06125%] of Sears' net assets."

[17]ARCO argues the compensatory damages were $79,061. This amount was only the actual "out-of-pocket" loss as distinguished from future lost profits, allowable under California law as compensatory damages for certain kinds of fraud.

[18]ARCO asserts in several places that Nielsen contended a $15,000 punitive damage case, *Hartman v. Shell Oil Co.,* 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977), was " 'closely analogous'." Pet. 9 n. 5; 18:14. Nielsen argued that *Hartman* is closely analogous on the compensatory damages issues, but never argued that it is analogous on the punitive damage issues. See App. 28a *et seq.*

supervisory jurisdiction over state courts and, in reviewing a state court judgment, is confined to evaluating it only in relation to the Federal Constitution. *Chandler v. Florida,* 449 U.S. 560, 570 (1981).

B. The Eighth Amendment Excessive Fines Clause Does Not Invalidate California's Long-Standing Standards

The Excessive Fines Clause issues — historical and practical — have been fully briefed in *Bankers Life.* Therefore, only a few additional comments will be made here.

Appellant in *Bankers Life,* petitioner in *Downey,* and ARCO here, argue that under an Excessive Fines analog, criminal fines for similar conduct in the range of \$500 to \$2,500 (*see* Pet. 18 n. 8) is the maximum punitive damages amount that can constitutionally be allowed. This argument not only fails to adequately respond to the countless cases over the centuries both in England and the United States which have refused to apply any such limits to punitive damages, but also, as to California, ignores the California legislature's current attention to and decision about the cluster of considerations relevant to determining what is "excessive" punitive damages in a given case.

Effective January 1, 1988, California enacted the Civil Liability Reform Act of 1987. One of its major provisions modified existing statutory law on punitive damages, codified at California Civil Code § 3294. Among the changes are that oppression, fraud or malice which give rise to punitive damage liability must now be "proven by clear and convincing evidence"; previously these had to be established by a preponderance of the evidence. Also, the

statutory definitions of "malice" and "oppression" were amended to add that the conduct must be "despicable."

The California legislature is aware of and regularly reacts to case law in its jurisdiction as well as the impact of its previously enacted statutes. "We must . . . assume that in passing a statute the Legislature acted with full knowledge of the state of the law at the time [citations]." *In re Misener,* 38 Cal. 3d 543, 552, 213 Cal. Rptr. 569 (1985); to similar effect is *Samuels v. Dist. of Columbia,* 770 F.2d 184, 194 and n. 7 (D.C. Cir. 1985) for Congress. The legislature did not, although it certainly could have, set monetary limits or fixed ratios on punitive damages. Thus, at least as to California, the legislature after assessing and reevaluating the myriad of policy considerations chose not to draw the analog to criminal fines or to otherwise set a fixed limit on punitive damages. By implication, the subjective societal value judgment advocated by petitioners in *Bankers Life,* in *Downey,* and in this case has been rejected by the duly elected legislature in California, and should not be second-guessed. The legislature, well aware of all criminal penalties — fines or otherwise — is, at least for the present, satisfied that civil punitive damages are not "excessive" under current jury discretion, judicial scrutiny and controlling case law.

C. ARCO's Due Process Clause Argument Does Not Justify Granting The Petition

ARCO's due process, really tag-along, argument is that it "should receive . . . all of the rights [it] would have in a criminal trial." Pet. 20:6-10. Before speculating on what ARCO might mean by this blunderbuss, one important point is noted.

ARCO does not and cannot argue that it was subjected to liability without notice or under changing law. Thus,

ARCO's due process argument is fundamentally weaker than either *Bankers Life* or *Downey* where defendants both claim they were subjected to substantive law which had been formulated in the respective states after the complained-of conduct. In contrast, ARCO was found liable for fraud and deceit (failure to disclose) (CT 640-41) under well-defined law. Moreover, California has since 1872 codified that punitive damages in civil cases are allowed for fraud. Likewise, California case law has long held that the amount of punitive damages is to be determined under the three-factor guidelines previously discussed. *See generally Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.,* 155 Cal. App. 3d 381, 202 Cal. Rptr. 204 (1984), for a complete historical tracing of California's punitive damages law. Neither at trial, nor to the Court of Appeal nor to the California Supreme Court did ARCO ever argue that the jury was not properly instructed under this long-standing law, nor that the law was unfair in substance or application, nor that the law changed to ARCO's surprise.

Even if ARCO's claim did encompass substantial due process questions, it would be inappropriate to review them as presented here. ARCO's due process claim includes the entire range of criminal procedures and safeguards. As this Court has often explained, "[e]ach constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved." *Johnson v. New Jersey,* 384 U.S. 719, 728 (1966); *accord Brown v. Louisiana,* 447 U.S. 323 (1980). Among these procedural rules and rights are the Double Jeopardy Clause, the right against self-incrimination, unanimous jury verdicts (both for acquittal and criminal liability), liability "beyond a reasonable doubt,"

and the right to competent counsel, as well as appointed counsel if the accused is indigent. ARCO's position would have extraordinary consequences for state tort systems (*see Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) ("Punitive damages have long been a part of traditional state tort law.")) and indeed require wholesale revision of state tort systems.

Given that ARCO has not objected to, identified, discussed or argued any particular due process right afforded criminal defendants, given that neither the trial court, nor the California Court of Appeal nor the California Supreme Court has been presented any such argument or issue as applied to this case, given that ARCO never even mentioned "due process" until now, this Court should not grant review on the due process issues raised.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

February 10, 1988

Respectfully submitted,

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I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 10, 1988, I served the within Brief in Opposition in re: "Atlantic Richfield Company -v- John V. Nielsen" in the United States Supreme Court, October Term 1987, No. 87-1196;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be Served have been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 10, 1988, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA

(3)

No. 87-1196

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
Petitioner,

vs.

JOHN V. NIELSEN
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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No. 87-1196

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OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,
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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

The Petition (at 13-20) demonstrates the many respects in which the $3,500,000 punitive damage award in this case is grossly excessive when compared to fines for comparable conduct, other punitive damage awards in comparable cases, the Respondent's injury and the culpability of ARCO's conduct, and, therefore, should be scrutinized under any new Constitutional principles that this Court announces in either *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 ("*Bankers Life*"), which was argued on November 30, 1987, or *The Ohio Casualty Insurance Co. v. Downey Savings and Loan Ass'n*, No. 87-159 ("*Downey Savings*"). The briefing and argument in those cases establish the reasons why this Court must depart from existing precedent to announce a new constitutional right to be free of unlimited and standardless punitive damage awards and the historical and legal bases for so departing.

Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this brief only to reply to the principal new

arguments raised in the Brief In Opposition ("Br. Opp.") of Respondent John V. Nielsen ("Nielsen") that are most important to this Court's decision to accept review.

1. Nielsen's Highly Misleading Statement Of Substantive Facts

Nielsen's Statement of Substantive Facts (Br. Opp. 3- 9) is totally misleading, as ARCO will demonstrate in its briefs on the merits. However, a brief reply now is necessary to Nielsen's suggestion that the $3,500,000 punitive damage award was appropriate, and is undeserving of review, because this case involved a company-wide program to defraud all ARCO dealers. Thus, Nielsen asserts that ARCO had a crash program to salvage its retail gasoline division by converting retail stations into mini-markets. He also asserts that ARCO engaged in a practice of "suppl(ying) station operators with false profit data and misleading descriptions of its analysis and expertise." (Br. Opp. 1-2.) It was exactly this emotional approach that caused the jury to award enormous punitive damages.

However, there is no truth in any of these assertions. Mr. Nielsen has not pointed to one scrap of admissible evidence — because there is none — that ARCO misled any other dealer. In fact, Nielsen's Statement effectively concedes (Br. Opp. 6-7), the principal alleged fraud was that lower level employees of ARCO fabricated data unique to Nielsen's station in order to justify ARCO's conversion of that station into a mini-market. ARCO then invested over $140,000 of its own money (and Mr. Nielsen invested $26,000) based upon this allegedly fraudulent justification.

ARCO submits that, when, as in this case, a $3,500,000 punitive damage award can be affirmed on the basis of a highly illogical claim of fraud by low level employees that injured a single individual, there can be no question that state limitations on such awards are ineffective and that federal constitutional limitations are needed to protect defendants from unfair and capricious punitive damage

awards.[1] The facts of this case, even more than those of *Bankers Life and Downey Savings,* cry out for the application of such standards.

2. Nielsen's Erroneous Argument That ARCO Waived Yet Unannounced Constitutional Rights

Nielsen contends that ARCO waived any rights to object to the punitive damage award under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment that this Court might announce in *Bankers Life* or *Downey Savings* by not "properly rais[ing] in state court proceedings" the constitutional questions presented here. (Br. Opp. 14-21.) Nielsen's waiver argument, however, is based upon misstatements of (1) the test for determining waiver articulated in the very opinions he cites and (2) the availability of these constitutional rights at the time of ARCO's alleged waiver.

Nielsen cites *Smith v. Murray,* 477 U.S. ____, 91 L. Ed. 2d 434, 446 (1986), and *Engle v. Isaac,* 456 U.S. 107, 130-34 (1982), as having developed in a "closely analogous context" the rule that "the perceived novelty or futility of a claim does not excuse the failure to raise it." (Br. Opp. 15.) *Smith* did hold that the petitioner there could not rely on the novelty of his claim as an excuse for not raising it in state court. However, the *Smith* Court quoted with approval the following language from *Reed v. Ross,* 468 U.S. 1, 18 (1984):

> " '[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.' * * *"

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[1]Nielsen notes that the trial judge commented that the jury could have arrived at a "larger number" for punitive damages. (Br. Opp. 9-10 n.4.) He fails to note that the trial judge so believed only because of the "broad discretion given to juries" and also stated that "it is pretty clear that punitive damages are getting out of hand." (Reporter's Transcript, Vol. XIV, p. 22.)

477 U.S. at ____; 91 L. Ed. 2d at 446. The *Smith* opinion proceeded to articulate the test for determining when a federal claim need not be raised in accordance with state procedures, as follows:

> "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all."

(*Id.*) Similarly, the *Engle* Court, after noting that "numerous courts" had accepted the position defendant then urged and others had rejected it, concluded that the issue there had been waived only because it was "a live one in the courts at the time" of the waiver. 456 U.S. at 132-33 & n.41.

To the contrary, the constitutional claims presented here — that either the Eighth Amendment or the Due Process Clause limits punitive damage awards in civil cases — were not, and still are not, "available." Nor were the issues raised by these claims "live ones" at the time ARCO was before the California trial court and Court of Appeal. Nielsen's attempt to prove that these issues have been "fermenting in California and other courts for years" (Br. Opp. 15:17-18) proves just the opposite. First, Nielsen's demonstration makes no mention of *Ingraham v. Wright*, 430 U.S. 651, 664 (1977), in which this Court described as a "longstanding limitation" the principle that the Eighth Amendment applies only to criminal proceedings. *See* Petition, at 10.

Moreover, Nielsen cites a string of cases which demonstrate that the California courts have consistently held themselves foreclosed by decisions of this Court (and then the California courts) from applying either the Eighth Amendment or the Due Process Clause to punitive damages in civil cases. (Br. Opp. 12-13 n.7.) The string begins with *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 716-17, 719, 60 Cal. Rptr. 398 (1967), where the Court of Appeal rejected the argument that the Constitution required criminal safeguards in punitive damage cases simply by noting that the argument had "no case" support and that this Court had "considered and rejected arguments similar to those now urged." It also rejected the argument that there were insufficient standards

to control the circumstances in which punitive damages were awarded and the amount of such awards with the conclusion that such awards provided "no offense to the Constitution, and no deprivation of any constitutional right." The other districts of the California Court of Appeal, including the Fourth (which decided this case), by rote followed *Toole* with one-sentence decisions (quoted below) that never analyzed the constitutional issues.[2] The California Supreme Court uniformly has rejected the constitutional argument with similar one-sentence rulings; "not[ing] in passing that on several occasions section 3294 [authorizing punitive damages] has been held constitutional,"[3] refusing "at this late date * * * to hold the section [authorizing punitive damages] unconsti-

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[2]*Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404-05, 89 Cal. Rptr. 78 (1970) (4th Dist.) ("An essentially similar contention was made and rejected in *Toole* * * *"); *Wetherbee v. United Ins. Co.*, 18 Cal. App. 3d 266, 272, 95 Cal. Rptr. 678 (1971) (1st Dist.) (*Toole* "reject[ed] an identical argument, [and] noted that the United States Supreme Court rejected such contentions"); *Gibson v. Gibson*, 15 Cal. App. 3d 943, 949, 93 Cal. Rptr. 617 (1971) (3d Dist.) (citing only *Toole*: "We reject the contention, however, that the due process principles regarding incompetent counsel in criminal proceedings should be transported into civil proceedings, even those involving punitive damages"); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-02, 136 Cal. Rptr. 132 (1976) (2d Dist.) ("Both of these contentions have been rejected by the courts of this state"); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 811, 174 Cal. Rptr. 348 (1981) (4th Dist.) ("Ford's contention that the statute is unconstitutional has been repeatedly rejected"). This demonstration, as well as the California Supreme Court opinions discussed in the text, refutes, at least in this context, several of Nielsen's arguments: (1) that "[i]t is not uncommon for different districts to reach opposite conclusions on important, current issues" (Br. Opp. 20 n.13); (2) that a state court that has previously rejected a constitutional issue may change its mind (*id*); and (3) that the "California cases had previously framed the issues." (Br. Opp. 17: 15-16.) Those cases had foreclosed, not framed, the constitutional issues.

[3]*Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 66 n.13, 118 Cal. Rptr. 184 (1974).

tutional — a proposition that has been frequently rejected,"[4] and stating "[i]t is not necessary to devote extensive discussion to the question; the courts have frequently and uniformly upheld that provision's validity."[5] Most recently, the Court of Appeal in *Downey Savings & Loan Ass'n v. The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 1101, 234 Cal. Rptr. 835 (1987), cited *Ingraham* to support its one-sentence decision that "the Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved here," and cited *Toole* to support its other one-sentence decision that "[w]here, as here, the action is civil in nature, civil rules rather than criminal rules of procedure apply."

None of the California opinions contains any analysis of the constitutional provisions, their history or their purposes, and none either discusses the application of the Constitution to the particular facts of the case or suggests that the constitutional issues are open or difficult. Unlike in *Engle*, there are *no* cases from *any* jurisdiction that accept the constitutional rights claimed here. In these circumstances, there was no reason for ARCO to have claimed the rights in these state courts that have uniformly held that they are bound by this Court's precedent to reject those rights. Moreover, as indicated by the lack of analysis of the issues or the particular facts in *Downey Savings*, there was no benefit to be gained by so doing. The right simply was not "available" in state court, and under *Reed*, *Smith* and *Engle*, ARCO had cause not to raise it.[6]

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[4]*Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 807, 819-20, 157 Cal. Rptr. 482 (1979).

[5]*Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2, 185 Cal. Rptr. 654 (1982).

[6]Nielsen grossly overstates ARCO's position as eliminating "for most cases" the benefits of the rule providing that federal constitutional issues ordinarily must first be presented to the state courts. (Br. Opp. 15: 3-8.) ARCO contends only that issues are not waived until a decision of this Court changes clearly existing law and announces a new right. Of course, only a litigant whose time to seek

As explained in the Petition (at 10-11), this Court's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967), establishes that a litigant cannot waive a constitutional defense "prior to the announcement of a decision which might support it." Nielsen describes *Butts* as inapposite, because it involved an alleged waiver in a federal court and at the trial level. Therefore, Nielsen contends that *Butts* did not involve the requirement of properly raising federal issues in the state courts. (Br. Opp. 16:4-18.) However, there is no justification either in *Butts* or elsewhere to limit its waiver holding to proceedings in federal court. And, Nielsen also contends that ARCO waived its constitutional defense at the trial court, because "under applicable California procedural requirements, ' "[a] claimed violation of a constitutional right must be raised in the trial court to preserve the issue for appeal." ' " (Br. Opp. 19 n.12.) This case (assuming the Court announces a new constitutional right in *Bankers Life*) shares with *Butts* the determinative factor of an important decision of this Court announcing a new constitutional right subsequent to the alleged waiver. Moreover, this Court has applied the same reasoning underlying *Butts* to reject the same type of jurisdictional challenge Nielsen asserts here. For example, in *O'Connor v. Ohio*, 385 U.S. 92, 93 (1966), the Court held that a "failure to object in the state courts cannot bar the petitioner from asserting this federal right," where the federal right was announced for the first time in a decision after the completion of petitioner's state court appeals. The Court refused to charge the petitioner with "anticipating" its decision.

Nielsen also seeks to dismiss as *dictum* the description in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154 (1945), as a "customary procedure" (and therefore obviously an accepted procedure) the vacating of a judgment so that the state court can consider a constitutional issue not presented below but now available as a result of an intervening decision by this Court. While it is true, as the Petition (at 13:1-2) disclosed, that the Court did not follow the procedure

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review in this Court has not expired can obtain the benefits of such a new decision.

in *Duel*, the Court clearly endorsed the procedure and its rationale. The Court stated that "[w]e do not think appellant should be prejudiced by the fact that the decision came too late for it to obtain a ruling by the Wisconsin Court." (324 U.S. at 161.) It also stated that it "would not hesitate to adopt the procedure in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue." (*Id.*) Nothing in the opinion supports Nielsen's first purported distinction of *Duel* — that the procedure applies only where this Court seeks to avoid unnecessary adjudication of federal questions. And, Nielsen's second purported distinction — that the "extensive discussion" of the constitutional issues presented here should have caused ARCO to raise the issues even before this Court announces a new right in *Bankers Life* — is answered by the cases that show that the issues were foreclosed, not alive. *See* pp. 4-6, *supra*. Therefore, this Court can follow *Duel* to vacate the California Court of Appeal's decision and remand this case for an initial state court consideration of any new constitutional standards.

Finally, Nielsen contends that ARCO's citation of the Eighth Amendment to the California Supreme Court was too "casual" to apprise that court of the constitutional argument under this Court's recent decision in *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. ____, 95 L. Ed. 2d 474, 487 n.9 (1987). (Br. Opp. 19.) However, the *Rotary* holding that "casual reference to a federal case * * * is insufficient" is inapposite. There, the petitioner merely cited an opinion that made the argument at issue, but did not mention the argument. Here, ARCO not only cited the *Bankers Life* case, it specifically identified the argument as whether the punitive damage award violates the "Eighth Amendment's prohibition against 'excessive fines.'" (Petition, at 11-12.) This is more than sufficient. *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982) (this Court's jurisdiction "does not depend on citation to book and verse"). Nielsen's final argument — that ARCO's presentation to the Supreme Court was too late under state law — is answered by the *Butts* ruling that only known rights can be waived (388 U.S. at 143) and the *O'Connor* application of that principle, which holds that a

state procedural rule cannot bar the assertion of a newly announced federal claim. (385 U.S. at 93.)

3. Nielsen's Misleading Arguments On The Merits

As noted above, the defendants in *Bankers Life, Downey Savings* and this case have amply demonstrated the need for federal constitutional limitations on punitive damages. ARCO here replies only to several misleading arguments in Nielsen's Brief for not applying any such limitation to this case.

Nielsen asserts that the Court of Appeal did not rely exclusively on ARCO's wealth in approving the enormous punitive damages in this case. (Br. Opp. 22:1-14.) The Opinion (Petition, Appendix A) and Order Modifying Opinion (*Id.*, Appendix B) thoroughly refute this assertion by showing that the court simply stated but did not analyze any other factors. (*See* Petition, at 14; App. A, at 40a-41a; App. B, at 44a.) The Court of Appeal's statement that " 'under *any traditional formula* the amount is reasonable' " (as quoted at Br. Opp. 27:12-14) explicitly cited only ARCO's wealth as entering into the formula. (*See* Petition, 41a.) Nielsen's assertion that the $3,500,000 award is not a "trend-setter" nor "out-of-line" is belied by (1) the fact that it is exceeded in published California opinions only by *Downey Savings* and (2) the $15,000 punitive damages awarded in the concededly "closely analogous" case of *Hartman v. Shell Oil Co.*, 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977). Finally, Nielsen's suggestion that the California legislature recently has paid attention "to determining what is 'excessive' punitive damages in a given case" (Br. Opp. 24-25) is both incorrect and irrelevant. As Nielsen concedes (*Id.* 25:11-12), the legislature set no limits on, or standards for, the size of punitive damage awards. Moreover, the legislature's failure to set such standards has no bearing on this Court's right to invalidate state laws that infringe on constitutional rights.

CONCLUSION

For the reasons stated in the Petition and in this Reply, the Court should grant the petition and either reverse or remand the $3,500,000 punitive damage award for a state court determination of its propriety under standards the Court articulates in *Bankers Life* or *Downey Savings*.

February 22, 1988.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 22, 1988, I served the within Reply Brief in re: "Atlantic Richfield Company v. John V. Nielsen" in the United States Supreme Court, October Term 1987, No. 87-1196.

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

GEORGE J. BERGER
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All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 22, 1988, at Los Angeles, California.

STEVEN H. RESNICK